

**CHAPTERS
ON MARRIAGE
AND DIVORCE**

**Responses of
Ibn Ḥanbal and
Ibn Rāhwayh**

**TRANSLATED
WITH INTRODUCTION
AND NOTES BY
SUSAN A. SPECTORSKY**

CONTENTS

PREFACE	ix
ACKNOWLEDGMENTS	xiii
CHAPTER 1	
Introduction	1
CHAPTER 2	
Compilation of Abū Dāwūd al-Sijistānī	60
CHAPTER 3	
Compilation of 'Abd Allāh b. Aḥmad b. Ḥanbal	91
CHAPTER 4	
Compilation of Ishāq b. Maṣṣūr al-Kausaj	143
APPENDIX	
The Manuscripts—Description and Critical Notes	255
WORKS CITED	263
INDEX OF QUR'ĀN VERSES	267
INDEX OF NAMES	268
INDEX AND GLOSSARY OF TOPICS AND TERMS	272

PREFACE

The texts in this book are translations of the sections that deal with marriage and divorce from three compilations of the responses of the third/ninth-century Muslim traditionist and jurist Aḥmad b. Ḥanbal. I chose to concentrate on the law of marriage and divorce because of the continuing intrinsic interest of these subjects and because of their historical importance. Many verses of the Qurʾān are devoted to regulations of aspects of marriage and divorce; improving and regularizing the social position of women was a central concern of the Prophet and of the early Muslims, and family law in general is an area in which religious law has always been and remains pervasive.

When I first began to study the texts translated here, my purpose was to examine Ibn Ḥanbal's jurisprudence, his *fiqh*, to follow out Joseph Schacht's statements about the reaction of the traditionists to the systematic elaboration of legal doctrine put forth by Muḥammad b. Idrīs al-Shāfiʿī. In his *Introduction to Islamic Law*, Schacht pointed out that the traditionists were dissatisfied with Shāfiʿī's methodology because they preferred to base their legal doctrines on traditions from the Prophet and to use human reasoning as little as possible. However, despite the proliferation of traditions, they were unable to do without it. Schacht continues:

But the reasoning they used was of a cautelary nature, concerned with moral issues and differing widely from the systematic legal thought which had been brought to technical perfection by Shāfiʿī and which the Traditionists disliked.

On Ibn Ḥanbal specifically, Schacht says:

This becomes apparent in the oldest legal texts inspired by traditionist doctrine which contain the teachings of the prominent Traditionist Ibn Ḥanbal and were compiled by his disciples in the

same way in which the disciples of Mālik had edited the teachings of their master.¹

The texts to which Schacht refers are the subject of this book. They are compilations of Ibn Hanbal's *Masā'il*, his responses to questions of legal interest put to him by fellow scholars and students. One of the compilations of Ibn Hanbal's responses also includes responses of another contemporary jurist and traditionist, Ishāq b. Rāhwayh.

It soon became apparent that to investigate the traditionist reaction to Shāfi'i through these texts it was first necessary to read them within the historical context of the previous development of *fiqh*. To a certain extent, of course, everything needs to be understood in a historical context, but that is particularly true of the responses translated here, since they are compiled from discussions among specialists who took a vast amount of material for granted and referred to it only elliptically as they clarified particular points of law. The translation presented here with an introduction and notes is a product of this preliminary work.

To provide the context for the material covered in these responses, I devote the major part of the introductory chapter to summarizing the development of legal opinion about different topics of marriage and divorce and to comparing the way these topics are discussed in the translated texts with the way they are treated in the sections on marriage and divorce in the *fiqh* works of three other jurists: Mālik b. Anas (d. 179/795) and Muḥammad b. Idris al-Shāfi'i (d. 204/820), the two most immediate and illustrious predecessors of Ibn Hanbal and Ibn Rāhwayh, and one of their contemporaries, the Mālikī scholar Saḥnūn b. Sa'īd al-Tanūkhī (d. 240/853). In addition, where it seemed informative, I have noted in my discussion of various issues whether they are treated in *ḥadīth* collections. I have also added some notes to each of the texts to elucidate details not covered in the more general introductory chapter.

The summaries and comparisons included here are meant to serve as a beginning and as a guide to the understanding of these responses. I have largely limited myself to the material found in the works of Mālik, Shāfi'i, and Saḥnūn because these jurists included many of the same topics and covered them in much the same way. Similarly, I have restricted my use of *ḥadīth* compilations to the Sunni collections of Prophetic traditions, the "six books," Dārimī's *Sunan*, and Ibn Hanbal's *Musnad*. But I have also referred to a few other

primary sources and a number of secondary works which are helpful for explaining points of detail. A work that perhaps counts as both a primary and a secondary source is the *Mughnī* of Muwaffaq al-Dīn b. Qudāma (d. 620/1223). The *Mughnī* is ostensibly a commentary on the *Mukhtaṣar* of Abū'l-Qāsim al-Khiraqī (d. 334/945), but it is actually a lucid and valuable history of the development of *fiqh*. It is extremely useful for understanding some of the issues discussed in these texts, both because of its scope and because Ibn Qudāma had available to him a number of Hanbali texts now lost.² There is much additional material for comparison in other early *fiqh* works, as well as other *ḥadīth* collections; I have also not tapped the wealth of material in early Qur'ān commentaries. However, the introduction and notes should be sufficient to make these responses available for study and future research.

In the translations, to clarify the articulation of the topics and for convenience of reference, I have numbered the responses consecutively. I have tried to use idiomatic, contemporary English, and to make the wording full enough to resolve ambiguities, but I have also attempted to follow closely the structure of the original Arabic. Words which I have added to compensate for the density of expression in the original are enclosed in square brackets. I use parentheses for my own explanatory remarks. Words which have no satisfactory English equivalent (or for which the available equivalents would be misleading) I have simply transliterated after explaining their meaning. One of the most noticeable aspects of these texts is how fluid the terminology is; for the most part, therefore, I have translated terms according to the demands of the context (words which might be of interest to Arabists are given in transliteration in parentheses). But I have always translated the following words the same way: *ḥaddatha*, to relate; *akhbara*, to inform; *anba'a*, to tell; *rawā*, to transmit; and *'an*, on the authority of. Unless otherwise noted, all questions from the Qur'ān are from Pickthall's translation.

In general, I have followed the system of transliteration used in *The Encyclopaedia of Islam*, except that I have used *j* for *dj* and *q* for *k*.³ I

² For example, Ibn Qudāma refers to and quotes the *Kitāb al-jāmi'* by the fourth-century Hanbali scholar Abū Bakr al-Khallāl (d. 311/923; see Fuat Sezgin, 1: *Geschichte des Arabischen Schrifttums*, 511–512), fuller versions of Abū Dāwūd's and 'Abd Allāh's compilations, and the works of Abū Bakr al-Najjād (d. 348/959; see Sezgin, 1: 513–514), a disciple of both 'Abd Allāh b. Ahmad b. Hanbal and Abū Dāwūd al-Sijistānī.

³ For Abū'l-Qāsim al-Khiraqī, see Sezgin, 1: 512–513.

⁴ References to the *Encyclopaedia of Islam* through the letter *M* are to the new edition; thereafter, to the first edition.

¹ Joseph Schacht, *An Introduction to Islamic Law*, pp. 62, 63.



ACKNOWLEDGMENTS

have not changed the spelling of words common in English usage, such as Baghdad, Mecca, or Sunni. Both Muslim (A.H.) and (A.D.) Christian dates are given in parentheses after the names of early jurists or *ḥadīth* transmitters.

The introduction is especially intended to assist those not familiar with the primary sources of Islamic jurisprudence in acquiring from the translation an understanding of the kinds of issues these scholars discussed and the ways in which they discussed them. The remaining sections of the book are directed to the interests of specialists. The appendix describes the manuscripts of each of the texts, and it includes the critical notes (indicated by raised letters in the translation) recording the variants in each of them and in the printed versions. These notes should make it possible for a reader of one of the Arabic versions to control the textual evidence. Finally, there are an index of Qur'ānic verses, a full index of names, and a glossary-index of terms and topics. Readers familiar with *fiqh* will be able to start with these to locate the details of particular problems or to connect particular individuals and doctrines. Comparatists or specialists in other areas of legal and social history will be able to find the sections of the introduction and of the translation relevant to the topics of their investigations.

Previous studies of the early history of the development of *fiqh* have concentrated on the period before Shāfi'i or on Shāfi'i himself. For the period after Shāfi'i, there has been a tendency in most secondary works to skip the remainder of the third/ninth century and to resume with Abū Ja'far al-Ṭabarī (d. 310/923). I hope this book will be a contribution to providing a continuous history.

I would like to thank the many people who have helped this project along over the years. Considerations of length make it impossible to mention all of them by name. Foremost I would like to pay tribute to my late teacher Professor Joseph Schacht, who first interested me in Ibn Ḥanbal's jurisprudence. His untimely death in 1969 was a tremendous loss to the field of Islamic legal scholarship. Professor Richard Frank and the late M. M. Bravmann were extremely helpful when I completed my dissertation on the legal doctrines of Ibn Ḥanbal, incorporating material from the first two texts presented here.

I am grateful to the National Endowment for the Humanities for a translation grant in 1978 that enabled me to complete an initial translation of the responses compiled by Ishāq b. Maṣṣūr al-Kausaj, and to the City University of New York for three PSC-BHE awards (1978, 1979, and 1980). Rachel Lidov devoted many hours to the preparation of the penultimate draft of this translation.

More recently, Michael Carter and Michael Cook read a draft of the book and made many valuable suggestions. I am grateful for the attention they gave the manuscript. Although I have not been able to incorporate all their suggestions, the book has gained immeasurably from their expertise. Jeanette Wakin has been unstinting in offering, over all these years, her time and her exceptional knowledge of early Muslim jurisprudence, as well as in giving me the benefit of her close reading of the final draft.

At the University of Texas Press, everyone with whom I have worked has been extremely helpful. Frankie W. Westbrook took a continuing interest in this project and oversaw its completion with care. I would also like to thank Carolyn Cates Wylie, Jan McInroy (for meticulous copy-editing), and all others who contributed to the book's production.

Despite the efforts of all these people, a work of this kind is bound to have errors in it. Some will be questions of interpretation; others will be mistakes. I alone am responsible for these.



CHAPTERS ON MARRIAGE AND DIVORCE

CHAPTERS ON MARRIAGE AND DIVORCE



CHAPTERS ON MARRIAGE AND DIVORCE

CHAPTER I

The Foundation

CHAPTER I

CHAPTER I

CHAPTER I

CHAPTER I

CHAPTER I



CHAPTER 1

Introduction

The Compilations

This book presents the legal doctrines of two renowned jurists of the third century of Islam, Aḥmad b. Hanbal (d. 241/855) and Ishāq b. Rāhwayh (d. 238/853). It consists of an introduction and an annotated translation of the sections on marriage and divorce which are contained in three compilations of the responses of Aḥmad b. Hanbal to questions of juristic interest.¹ One of these compilations also contains the responses by Ishāq b. Rāhwayh. Their responses are the only material available for a study of the jurisprudence of these two men. Ibn Hanbal did not write any separate work of jurisprudence, and although Ibn al-Nadīm lists Ibn Rāhwayh as the author of a work of jurisprudence, it has not survived.²

The compilations are translated here in order of length. The first was compiled by the traditionist Abū Dāwūd al-Sijistānī (d. 275/888); it is referred to here as AD. The second was compiled by Ibn Hanbal's son 'Abd Allāh (d. 290/903) and is referred to here as AA. The

¹For manuscript and publication information about these collections, see the appendix. A fourth collection, by Abū Ya'qūb Ishāq b. Ibrāhīm b. Hānī al-Nishāpūrī (d. 275/888), was edited and published by Zuhair Shāwīsh (Beirut, 1400/1980). It is shorter than any of the three collections I have used here, and it does not add significantly to an understanding of Ibn Hanbal's *fiqh*. It has not been included in this study. For Ishāq b. Ibrāhīm b. Hānī, see Abū'l-Ḥusain Muḥammad Ibn Abī Ya'la, *Tabaqāt al-Ḥanābila*, 1:108–109.

²For a full listing of Ibn Hanbal's works, see the entry on him in Sezgin, 1:503–509, where his full name is given as Abū 'Abd Allāh Aḥmad b. Muḥammad b. Hanbal. Ibn al-Nadīm mentions Ibn Rāhwayh's *Kitāb al-sunan fi'l-fiqh*, which might be translated as "A Book of Legal Rules," or possibly of "Legal Norms," or "Correct Opinions," depending on the meaning given to *sunan*. See Ibn al-Nadīm, *Fihrist*, 1:230.

third—by far the longest—was compiled by the Hanbali scholar Abū Ya'qūb Ishāq b. Mansūr al-Marwazī al-Kausaj (d. 251/865).³ This compilation also includes responses by Ibn Rāhwayh; it is referred to here as IK.⁴

Ibn Hanbal was born in Baghdad, where he spent most of his life studying and teaching theology, the traditions of Islam (*ḥadīth*), and jurisprudence (*fiqh*). His reputation as a theologian arose in his lifetime and was enhanced by his courageous defense of the Sunni belief in the uncreated Qur'ān. During the inquisition (*mihna*) instituted by the Caliph Ma'mūn, he refused to espouse the official doctrine that the Qur'ān was created, despite both torture and imprisonment.⁵ His reputation as a traditionist has also been constant and is based on his *ḥadīth* collection, his *Musnad*, which contains twenty-eight to twenty-nine thousand traditions.⁶ His reputation as a jurist, however, was formed later; for reasons not yet entirely clear, he was not even thought of as one for a long time.⁷ Nonetheless, during his lifetime,

³For Abū Dāwūd Sulaimān b. al-Ash'ath b. Ishāq b. al-Azd al-Sijistānī, see Sezgin, 1:149–152; for Abū 'Abd al-Rahmān 'Abd Allāh b. Ahmad b. Muhammad b. Hanbal, see Sezgin, 1:511; for Abū Ya'qūb Ishāq b. Mansūr b. Bahrām al-Marwazī al-Kausaj, see Sezgin, 1:509.

⁴It was not unusual for Ibn Hanbal's responses to be linked with those of another scholar. See Henri Laoust, "Le Hanbalisme sous Le Califat de Baghdad," p. 75.

Abū Ya'qūb Ishāq b. Mansūr b. Bahrām al-Marwazī al-Kausaj is referred to in bio-bibliographical works as either Ishāq b. Mansūr or al-Kausaj. IK seems the clearest two-letter abbreviation for his compilation, but I will refer to the person as Kausaj.

⁵For Ibn Hanbal's life, see *EI*, s.v. "Ahmad b. Hanbal"; Sezgin, 1:502–503; and references in both places to medieval bio-bibliographical sources. For Ibn Hanbal's role in the *mihna*, see W. M. Patton, *Ahmad b. Hanbal and the Mihna*.

⁶Ibn Hanbal's *Musnad* was transmitted mainly by his son, 'Abd Allāh, who made additions and corrections to the work, and then by 'Abd Allāh's student Abū Bakr al-Qatīrī (d. 368/978–979). A useful secondary study of Ibn Hanbal's *Musnad* is Ignaz Goldziher's "Neue Materialien zur Literatur des Überlieferungswesens bei den Muhammadanern."

Ḥadīth means either the traditions of Islam, collectively, or one tradition (for more than one tradition the plural is *ahādīth* or, in English discussions, *hadīths*). Each individual tradition consists of two parts. The text (*matn*), which can be quite short or several pages long, contains information about the life of the Prophet, his family, and his close associates, as well as of the practices that evolved in the early Muslim community. Each text is preceded by a chain of oral transmitters (*isnād*), with the most recent listed first; they are joined by the phrase "on the authority of." The earliest transmitter was usually someone who had known the Prophet or one or more of his contemporaries. For a full discussion of the history and importance of *ḥadīth*, see *EI*, s.v. "Ḥadīth."

⁷For example, Abū Ja'far al-Ṭabari did not include Ibn Hanbal in his *Ihtilāf al-Fuqahā*, and 'Abd Allāh b. Muslim Ibn Qutaiba does not include him among the founders of the various *madhabs* (schools of law) in his *Kutāb al-ma'ārif*. See Ignaz Goldziher, *The Zāhiris: Their Doctrine and Their History*, p. 4.

fellow scholars and students collected his responses to questions of legal interest, and successive generations of Hanbalis continued to build on their work, using his teachings as the basis for the development of a sophisticated system of legal theory.⁸

Ibn Rāhwayh was born in Merv and, after traveling extensively in connection with his studies, finally settled in Nishapur.⁹ He and Ibn Hanbal had a number of the same teachers, including Sufyān b. 'Uyayna (d. 198/813), a prominent scholar of the Hijaz, many of whose legal opinions will also be found here in Kausaj's compilation of responses.¹⁰ Today, Ibn Rāhwayh is less well known than Ibn Hanbal, and he too is thought of mainly as a traditionist.¹¹ His *Musnad* has not survived intact, but it is not unreasonable to suppose it contained at least as many traditions as Ibn Hanbal's. He was known for his prodigious memory and the number of traditions he knew by heart.¹² However, in his own lifetime, and certainly for several centuries thereafter, he enjoyed a considerable reputation as a jurist as well as a traditionist.¹³

⁸For the scholarly activities of the successive generations of Hanbali scholars, see Laoust, "Le Hanbalisme." For a summary assessment of the nature and historical development of the Hanbali school of law, see Schacht, "Theology and Law in Islam," in *Theology and Law in Islam*, 5–7.

⁹"Ibn Rāhwayh" is the spelling of his name used throughout this book and in *EI*, where his full name is given as Abū Ya'qūb Ishāq b. Ibrāhīm b. Makhlad b. Ibrāhīm Ibn Rāhwayh al-Hanzali al-Marwazī. In Sezgin, 1:109, he is Ibn Rāhūya rather than Ibn Rāhwayh. Unvoweled texts allow either spelling. Recent secondary works in English refer to him as Ishāq, or as Ibn Rāhawāh (also possible on the basis of an unvoweled text).

¹⁰For Sufyān b. 'Uyayna, see Sezgin, 1:96. For Ibn Hanbal's teachers, see Henri Laoust, "Ahmad b. Hanbal," in *EI* and Laoust, "Le Hanbalisme," pp. 69–70. For Ibn Rāhwayh's teachers, see reference in previous note.

¹¹Sezgin lists him with the traditionists (1:109–10), and Schacht's article in *EI*, s.v. "Ibn Rāhwayh," describes him as a traditionist. However, Abū Ishāq al-Shīrāzī in his *Tabaqāt al-Fuqahā* lists him as a *faqīh* of Khorasan, and Taj al-Dīn al-Subkī in his *Tabaqāt al-Shāfi'iyya al-Kubrā* reports that he was among those who actually sat with Shāfi'i. That is perhaps why Goldziher, in *The Zāhiris*, refers to Ibn Rāhwayh as a Shāfi'ite lawyer.

¹²Ibn Rāhwayh is reported to have said of himself, "I know seventy thousand *ḥadīths* by heart, and I can discuss one hundred thousand," and "I have never heard anything that I did not learn by heart, and I have never learned anything by heart and forgotten it." See Shīrāzī, p. 94.

¹³See Shīrāzī, p. 94, where Ibn Hanbal himself is quoted as saying of Ibn Rāhwayh, "No one ever crossed the bridge who was greater in *fiqh* than Ishāq." Further, he is always described as a jurist (*faqīh*) and a traditionist (*muhaddith*) in biographical notices in medieval sources.

Ibn Rāhwayh's *Musnad* has not survived intact. There is a manuscript fragment of it in Cairo which I have not seen (see Sezgin, 1:110). The section of this manuscript which contains only 'A'isha's *Musnad* has over one thousand *ḥadīths* 'A'isha's *Musnad* is

Abū Dāwūd, although known mainly for his *ḥadīth* collection, was also a student and scholar of *fiqh*. He studied both *ḥadīth* and *fiqh* with Ibn Hanbal. 'Abd Allāh, Ibn Hanbal's son, is known to have worked closely with his father on all aspects of Ibn Hanbal's scholarly output. Kausaj seems to have followed much the same route as Ibn Rāhwayh. He too was born in Merv and, after traveling widely, settled in Nisāpur. He is known as a jurist and a traditionist, was a student of both Ibn Hanbal and Ibn Rāhwayh, and studied, as they did, with Sufyān b. 'Uyayna. All five men involved in the texts translated here belonged to overlapping groups of scholars who both studied and taught *fiqh* and *ḥadīth*.

All three of these texts cover the same topics, but they vary considerably in detail. Although there are a number of similar questions, details discussed in one version are omitted or mentioned only briefly in the other two, in accordance with the individual interests of the compilers. But although the three differ in their concerns, it must be emphasized that none of them bring up any unexpected issues.

By the third century of Islam, virtually all questions of *fiqh* had already been asked and various answers already given. These different answers were incorporated into all *fiqh* works, whether implied in the way questions were posed or explicitly, in special chapters devoted to disagreement (*ikhtilāf*). The different answers were also reflected in the thousands of traditions in circulation, many of them contradictory, through which the growth of legal doctrines can be charted.¹⁴ Some of the questions asked and answers given were practical; others, theoretical or casuistic. It is not always possible to tell what the origin of a particular problem might have been. Certainly, in family law, the bulk of the issues that preoccupied jurists were those that bore on the interpretation of qur'ānic verses, especially those related to the events in the life of the Prophet or in the lives of his Companions as they were chronicled in the *ḥadīth* collections. But not all jurists discussed all questions, and they certainly did not use all available traditions. Rather, they made use of the *ḥadīth* and *fiqh* material available to them for their own purposes.

This practice can be seen in the *fiqh* works of Mālik, Shāfi'i, and

Sahnūn.¹⁵ In his *Muwatta'*, Mālik sets forth the accepted doctrine of Madīna as he and his fellow scholars taught it, and he cites traditions to support Madinese practices and beliefs. He does not use traditions systematically, and he is not careful about *isnāds*. His overriding consideration for a decision about any given point of doctrine is the generally-agreed-upon practice of Madīna. In his *Kitāb al-umm*, Shāfi'i covers the same material that Mālik does, but he adds some different details and leaves out others, and he uses only those traditions which he finds have satisfactory *isnāds*. He applies his methodology in order to present *fiqh* doctrines systematically. In his *Mudawwana*, Sahnūn compiled the answers to various questions, given by Ibn al-Qāsim al-'Utaqi (d. 191/806), a disciple of Mālik.¹⁶ He also includes traditions and opinions from the Egyptian Mālikī scholar Ibn Wahb (d. 197/812).¹⁷ He covers some of the same details found in the *Muwatta'* and *Kitāb al-umm* but leaves others out and adds many not mentioned in either of those works. As in the *Muwatta'*, traditions are not used systematically; Sahnūn's purpose is to establish either Mālik's opinion on any given issue or the opinion of other Mālikī scholars.

The practice can also be seen in these collections of responses.¹⁸ Ibn Hanbal, Ibn Rāhwayh, and the compilers of these responses are familiar with all of the material and with the way their predecessors and contemporaries used it. What the three compilers wish to establish is how Ibn Hanbal and Ibn Rāhwayh find their way through it. To do so they bring up issues on which they know there was *ikhtilāf*, or matters they themselves are not sure about.

Each compiler put together responses collected from the answers given by Ibn Hanbal and Ibn Rāhwayh to questions asked in both public and private scholarly sessions. They asked the questions themselves, or they reported on a question asked by someone else while they were listening, or they simply reported an opinion of Ibn Hanbal or Ibn Rāhwayh. Abū Dāwūd says, for example, "I heard Ahmad [Ibn

¹⁴ For Sahnūn, see Sezgin, 1:468–471.

¹⁵ See *ibid.*, pp. 465–466.

¹⁶ For 'Abd Allāh b. Wahb b. Muslim al-Fihri, see *ibid.*, 1:466.

¹⁷ The word I have translated as "responses" is *mas'āl*; singular, *mas'ala*. *Mas'ala*, in the context of *fiqh* means either a question, an answer, or the subject matter of a particular problem or issue. A few times, in AD, Ibn Hanbal says that he does not give a *fatwā* on a particular issue. That is, he does not give legal advice if a case involving this issue is brought to him. Many of these responses can also be considered *fatwās*, and in bibliographic works, these responses are sometimes referred to as *fatwās*. Possibly, every *fatwā* is a *mas'ala*, but *mas'ala* also has the broader meaning mentioned above. For *fatwā*, see EI, s.v. "Fatwā."

the subject of a dissertation by Jamila Shaikat, "A Critical Edition, with Introduction, of Tradition Recounted by 'A'ishah, Extracted from the *Muṣnad* of Ishāq b. Rāhwayh" (Ph.D. diss., Cambridge University, 1984).

¹⁸ See Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, *passim*, for the historical stages of the development of various doctrines and the way these stages are embedded in *ḥadīth*. This development was virtually complete by the third century.

Hanbal] asked," or "I heard Ahmad reply. . . ." Once he says, "I saw Ahmad when a sheet of paper was brought to him. . . ." 'Abd Allāh adds two methods of collecting scholarly opinions not mentioned by the other two compilers: He says, "My father dictated to me . . ." and "I read to my father. . . ." In some cases there are follow-up questions and answers which can be considered part of the same response.¹⁹

Kausaj usually reports, "I said to Ahmad [Ibn Hanbal]" or "I said to Ishāq [Ibn Rāhwayh]," but his compilation is more complex than those of the other two. He often incorporates another layer in his questions by starting with "Sufyān [ibn 'Uyayna] said," or occasionally "I said to Sufyān," or "Sufyān was asked." After reporting Sufyān's doctrine on a particular issue, he reports Ibn Hanbal's opinion of what Sufyān said and then Ibn Rāhwayh's opinion of Ibn Hanbal's opinion of Sufyān's doctrine. Most often, all three men agree and Ibn Rāhwayh indicates his agreement very briefly. But sometimes Ibn Hanbal will object to a doctrine of Sufyān's and Ibn Rāhwayh will agree with one or the other, or even offer a third view. Kausaj brings up the doctrines of other scholars as well. Toward the end of this section of his compilation, he mostly records Ibn Rāhwayh's opinions without Ibn Hanbal's. Despite the appearance of dialogue that his compilation creates, he solicited the responses from Ibn Hanbal and Ibn Rāhwayh individually at a variety of times and places.²⁰

The actual forms of the answers Ibn Hanbal and Ibn Rāhwayh give are varied. They may answer a question with a word, or a sentence or two, or a full explanation of a particular matter, with or without a tradition. When they use a tradition in a response, sometimes they refer only to its most significant transmitter or to one of the people involved in the events related in the text. At other times they may offer a full *isnād*, or even several *isnāds* and a full text.

¹⁹In the manuscripts, an intermediate transmitter of the compilation occasionally appears at the beginning of a section. At the beginning of AD, he is identified as Abū Naṣr Muḥammad b. Ḥafṣ. Elsewhere in AD no name is given, and in AA and IK, this person is never identified. In the translations, I have set off this "extra" person's statement with a colon and have not added another layer of quotation marks. For methods of teaching and learning both *ḥadīth* and *fiqh*, see Nabia Abbott, *Studies in Arabic Literary Papyri*, 2: passim. See also Sezgin's introductory essays to the sections on *ḥadīth* and *fiqh*, 1:553–584, 393–401.

²⁰This particular version of Ibn Hanbal's responses must have been collected during his lifetime, because we learn that at one point he no longer wished to recognize them as valid. In *Ta'rikh Baghdad*, we learn that this was because Kausaj was transmitting them for money. However, in Ibn Abi Ya'la's *Tabaqāt al-Hanābila* we are told that Kausaj went back to Baghdad and reread them to Ibn Hanbal, who revalidated them. See Sezgin, 1:509 for these anecdotes.

Ibn Hanbal often rejects a doctrine by calling a particular tradition, or group of traditions, weak. Further, if he knows of conflicting opinions on an issue and cannot resolve them by preferring one tradition to another, he says, "I am afraid to answer."²¹ And for the most part his answers are very brief. These characteristics of his responses represent his refusal to let the exposition of the jurist take precedence over the study of *ḥadīth*.²² It also becomes clear, despite inconsistencies, that there is a moral dimension to Ibn Hanbal's responses: he gives preference to doctrines that protect women from exploitation, condemns the use of *hiyal* (legal stratagems), and requires actions and words to have consequences for which the doers and speakers are responsible.

Ibn Rāhwayh also answers questions within the framework of choosing among traditions. However, a number of the long and detailed explanations he offers for preferring one doctrine over another show concern for consistency and systematic thinking and exhibit little interest in the human or moral dimensions of a particular problem.

The compilers arranged their responses topically. The arrangement of the sections on marriage and divorce are similar in AD and AA. In AD, the whole section is called *abwāb al-nikāḥ* (Chapters on Marriage), with no separate title for divorce. In AA, there are two major divisions: *kitāb al-nikāḥ* (The Book of Marriage) and *kitāb al-ṭalāq* (The Book of Divorce). In addition, AA ends with a *kitāb al-ʿiddat* (Book of *ʿiddas*), which repeats material already mentioned in the *kitāb al-ṭalāq*. The material is further divided into sections by subtitles (written in red in the original manuscripts), usually but not always introduced by the word *bāb* (chapter). These subsections are of varying length. Some consist of only one problem—the one anticipated by the subtitle. In some of the longer subsections the subtitles refer only to the first problem discussed, while the ones that follow deal with subjects unrelated to the subtitle and unrelated to each other. (The

²¹See Susan A. Spectorsky, "Ahmad b. Hanbal's *Fiqh*," for an analysis of some of these responses.

²²Two anecdotes in Ibn Abi Ya'la (regardless of whether they are factual) describe Ibn Hanbal's attitude. For example, a student once asked him whether he should write down Shāfi'i's works, and he said that a traditionist did not need them. He reiterated this point to another student, who then asked specifically about Shāfi'i's *Risāla* (his methodological treatise on jurisprudence). Ibn Hanbal replied, "No, ask me something about *ḥadīth*." The student then wanted to know whether Ibn Hanbal himself had copied the *Risāla*, and the answer was, "God forbid!" Another time, Ibn Hanbal said, "As for *ḥadīths*, I am comfortable with them; as for *masā'il*, I have sworn that if anyone asks me about anything I will not answer." See *Tabaqāt al-Hanābila*, 1:57, 131.

printed versions of AD and AA set out the responses separately; each is quite short and usually consists of one question and the answer to it.) In IK, the whole section on marriage and divorce is simply called *fi'l-nikāh wa'l-falāq* (Concerning Marriage and Divorce), and there are no further divisions. The subjects in IK tend to follow the order of the other two compilations, but there are exceptions. Overall, the arrangement of the material of all three texts resembles that used by Mālik in his *Muwattaʿa*,²³ by Shāfiʿi in his *Kitāb al-umm*, and by Sahnūn in his *Mudawwana*.²⁴ In the following discussion of the material, I have not followed the arrangement of topics found in any of the texts, but rather I have grouped the topics into the sections similar to those found in *fiqh* handbooks.²⁴

Topics of Marriage and Divorce

Marriage

From the issues raised in the responses on marriage, we can construct what might be called an ideal marriage contract. While such a contract is not usually spelled out, problems are always dealt with in terms of falling short of it. This ideal is roughly as follows: A woman's *wālī* (her appropriate guardian) accepts on her behalf an offer of marriage from a suitor who is her equal in status and not too closely related to her by consanguinity, foster-relationship, or marriage. Then, for an adequate dower,²⁵ the prospective bride's *wālī* and her suitor conclude a marriage contract in the presence of two legally qualified witnesses. The only general statement found in these texts about a marriage contract is in AD 17, where Abū Dāwūd asks Ibn Ḥanbal what the

minimum prerequisites are for such a contract, and Ibn Ḥanbal replies, "A suitor, someone to give the bride in marriage, and two witnesses." However, it turns out that in some instances witnesses are not required, and although Ibn Ḥanbal and Ibn Rāḥwayh insist that her *wālī* give a bride in marriage, others held that in certain circumstances she could give herself in marriage without consulting her *wālī*. Although the different aspects of a marriage contract are sometimes discussed together, for the most part, in these texts, the component parts of such a contract are taken up separately. It should be kept in mind that there is a difference, often unstated, between a marriage contract and marital relations which take place once the bride takes up residence in her husband's house. A considerable amount of time may elapse between the two, and a marriage contract can be terminated or a couple divorced before sexual intercourse has taken place.

The Guardian (*Wālī*)

Again, in an ideal situation a woman's *wālī* is her father, and he gives her in marriage after obtaining her consent. If she is a virgin (*bikr*), she is presumed to be shy and her consent to a marriage may be silent acquiescence, or laughter or crying (if either of the latter two is known to be her way of acquiescing). A woman who has been married, on the other hand, a *thayyib* or an *ayyim* (the terms are used interchangeably), must express her consent by speaking up on her own behalf.

Much attention is given to the extent of the father's authority over the marriage contract of a daughter; in fact, over his *bikr* daughter who is also a minor—that is, who has not reached puberty—his authority is virtually unlimited. He can give her in marriage without obtaining her consent, stipulate in the contract that some part of her dower be reserved for himself, and exempt her husband from the qur'ānic stipulation that the bride receive half of it as she normally would if divorce occurred before the marriage was consummated. The only event that would warrant interference with a father's authority is his refusal to comply when his daughter wishes to be married to a man who is her equal. At that point the judge should intervene and conclude a marriage contract for her.²⁶ A man has this same

²³ See Sezgin, 1:398, and references there, where Sezgin dates the beginning of the organization of juridical works into chapters to the end of the first century. For Mālik, see *ibid.*, pp. 457–464; for Shāfiʿi, see *ibid.*, pp. 484–490. For Sahnūn, see *ibid.*, pp. 468–471.

²⁴ For some examples, see T. W. Juybol, *Handbuch des Islamischen Gesetzes*; A. D. Russell and A. Suhrawardy, *A Manual of the Law of Marriage: From the Mukhtasar of Sidi Khalīl*; and Marghināni (trans. Hamilton), *The Hedaya*.

²⁵ I have translated the words *mahr* and *sadaq*, which are used interchangeably in these texts, as "dower." The more commonly used "dowry" suggests something brought to the marriage by the bride; the most exact translation for *mahr* or *sadaq*—something the groom gives the bride which she retains—would really be "bridal gift" (*donatio propter nuptias*), but this becomes awkward with repetitive use and the plural "bridal gifts" is particularly clumsy. "Dower" seemed a usable alternative, and context should make it clear that the word here means a gift from the groom that belongs to the bride.

²⁶ In addition to referring to a judge as a *qāḍī*, these texts often use several other words to mean "judge." They are included in the translation in parentheses. One of these words is *sultān*. In legal texts of the first three centuries of Islam, the word *sultān*

unlimited authority over the marriage contract of a minor son and over the marriage contracts of his slaves.²⁷

A girl who has reached puberty is considered of age, and it is appropriate for her to have sexual intercourse with her husband. At this point, her father ought to obtain her consent before giving her in marriage.²⁸

Once a woman is a *thayyib*, her father's authority to give her in marriage is limited. He can do so only with her consent, and she must express this consent verbally. A story often told to illustrate this point is that of Khansā' bt. Khidhām, who appealed to the Prophet when her father remarried her against her will after her husband died in battle at Uhud. The Prophet revoked her marriage and entrusted her with her own affairs.²⁹

If a woman has no father, she is referred to as an "orphan" (*yatima*),

is used in an abstract sense to mean "political authority." See *El*, s.v. "Ṣultān." See, for example, AD 19 and AA 2, for Ibn Hanbal's explanation that he means the *qadi* rather than the *amir* (the governor) when someone who is not a relative is needed to give a woman in marriage, because the *qadi* is in charge of sexual relations and legal judgments. See also Ibn Hanbal, *Musnad*, 6:47, where 'Abd Allāh b. Hanbal says, "My father said that the *sultān* means the *qadi* because he is in charge of sexual relations and legal judgments." The word I have translated as "legal judgments," *ahkām*, the plural of *ḥukm*, is discussed in *El*, s.v. "Ahkām": "The term *ahkām* is . . . used of the application of legal rules to concrete cases."

²⁷ Fifteen years of age is the point at which a minor boy becomes a major. For example, Shāfi'ī says a boy is no longer a minor once he is fifteen years of age, the age at which the Prophet considered *jihad* incumbent upon him and *hudud* punishments applicable to him. However, he can be considered a major at a younger age, Shāfi'ī says, if he has reached puberty (*ḥulum*). A girl is also of age at fifteen years, and earlier if she begins to menstruate earlier. Muḥammad b. Idrīs al-Shāfi'ī, *Kutāb al-umm*, 5:17. See also *El*, s.v. "Bāligh."

A slave needs his master's permission both to marry and to take a concubine.

²⁸ Ibn Hanbal is quite firm on this point. However, he reluctantly notes the Madinese position that as long as a woman is a *bikr* and her father is her *wālī*, he has the authority to give her in marriage without her consent, regardless of her age.

A woman comes of age when she begins to menstruate. Nine years of age is usually chosen as the earliest age at which a girl might be expected to menstruate. It is the age at which 'Ā'isha moved from her parents' home to Muḥammad's. In a much-quoted tradition, 'Ā'isha says, "The Prophet married me when I was a girl of six or seven, and he had intercourse with me when I was nine years of age." Shāfi'ī, *Umm*, 5:17. Shāfi'ī here combines two strands of the *matn* of this *ḥadīth*: one says the Prophet married 'Ā'isha at six years of age; the other, at seven. For other versions, see A. J. Wensink, *Concordance et indices de la tradition musulmane*, s.v. "ṭazawwaj."

²⁹ For Khansā' bt. Khidhām, see Muḥammad Ibn Sa'd, *Kutāb al-Tabaqāt al-Kahīr*, 8:334–335; Malik b. Anas, *Muwatta'at* Yahyā b. Yahyā, 3:143–144; Shāfi'ī, *Umm*, 5:17; Gertrude H. Stern, *Marriage in Early Islam*, pp. 34–35.

and her nearest male agnate becomes her *wālī*. There is some disagreement about ranking the agnates; for example, after her father comes either her paternal grandfather or her uncle.³⁰ The authority of an agnate *wālī* over an orphan's marriage contract is much more limited than the authority of her father. The texts emphasize two points: an agnate *wālī* cannot give a girl in marriage before she has reached nine years of age, and he cannot give her in marriage without obtaining her consent. If he does either of these things, the bride has the right to opt out of the marriage when she is of age. As is the case whenever her father does so, if an agnate *wālī* attempts to hinder a woman from marrying, she can appeal to the judge. When a woman has no male agnates or when they are, for some reason, unwilling to give her in marriage, it falls to the judge to do so.³¹

A number of responses deal with instances in which the wrong *wālī* gives a woman in marriage; either an agnate when her father is alive or the wrong agnate when a nearer one is available. In both these instances, Ibn Hanbal favors that a new contract be concluded by the appropriate *wālī*.³²

Another type of contract concluded by the wrong *wālī* is one in which a man takes the role of both suitor and *wālī*. Ibn Hanbal is against such a contract. He says that a *wālī* who wishes to marry his ward must get a second man to act as *wālī*. He supports this position with reference to the story of the Companion Mughīra b. Shu'ba, who, when he wished to marry a woman whose *wālī* he was, deputed another man to give her in marriage to him. The opposite of this is demonstrated by the story of the Companion 'Abd al-Rahmān b.

³⁰ In IK 17, Ibn Hanbal and Ibn Rāhwayh disagree about whether a woman's son comes before her father. For discussion of the order in which a woman's agnates assume responsibility for her, see *El*, s.v. "ʿAsaba" and Stern, pp. 37–42.

There is some variation in ranking a woman's agnates. Malik, for example, preferred that a woman's son give her in marriage before her grandfather (see *al-Mudawwana al-kubrā*, 2:161–164); but Shāfi'ī said a woman's son never acts as her *wālī*. He prefers, after her paternal grandfather, his father (*Umm*, 5:13–14).

³¹ This is expressed in the legal maxim "The *sultān* is the *wālī* of the one who has no other." For legal maxims and their evolution into traditions, see Schacht, *Introduction*, pp. 39–40. See Ibn Hanbal, *Musnad*, 6:47, for one instance of this maxim in a *ḥadīth*. See above, n. 26, for the note that 'Abd Allāh appends after this *ḥadīth* explaining that the *sultān* means the *qādi* (the judge).

³² Ibn Rāhwayh does not comment specifically on a marriage contract concluded by the wrong *wālī*, but several responses in IK deal with the question of what to do when two of a woman's *wālīs* simultaneously give her in marriage to different men. Both Ibn Hanbal and Ibn Rāhwayh favor upholding whichever marriage contract was concluded first.

‘Auf, who married Umm Hakim b. Qāriz himself after she had entrusted him with giving her in marriage.³³ Ibn Rāhwayh tends to agree with Ibn Hanbal but also says that if a man is both *wālī* and squire in a marriage contract that is properly witnessed, the marriage is valid.

Finally, there is the problem of a marriage contract concluded with no *wālī* at all. Ibn Hanbal says such a contract is not valid and that a new one must be concluded. He mentions the legal maxim “There can be no marriage without a *wālī*,”³⁴ but he does not mention in these texts the well-known tradition, found in his *Musnad* as well as in the classical collections, that ‘Ā’isha said the Prophet said, “The marriage contract of any woman who marries without her *wālī*’s permission is void, void, void (*bāṭil, bāṭil, bāṭil*).”³⁵ Shāfi‘ī, who agrees with Ibn Hanbal that such a contract is not valid, does mention this tradition and so does Mālik, who agrees, but with qualifications. In the *Mudawwana*, for example, Ibn Wahb reports him as saying that in the case of a lowly woman, he is less concerned about a marriage concluded without a *wālī* (*jadhālika akhaffu ‘indī*), as long as the marriage is concluded openly and is widely known.³⁶ In *Muwatta’* *Shaibānī*, Shaibānī describes Abū Hanifa’s position when he reports a tradition that ‘Umar b. al-Khaṭṭāb said it was not admissible for a woman to marry without the permission of her *wālī*, or of a relative with discernment, or of the judge. He then says that Abū Hanifa held that a *wālī* was not neces-

sary if a woman concluded a marriage contract for herself with a man who was her equal, for a dower that was not less than one appropriate for her.³⁷ Ibn Rāhwayh agrees with Ibn Hanbal that a marriage contract concluded without a *wālī* is invalid, but he disagrees with Ibn Hanbal’s insistence on a new contract and says that a woman’s *wālī* can, in fact, validate the contract retroactively.³⁸

Any conditions that are agreed upon as part of a marriage contract are valid, as long as they are not in themselves unlawful. In approving of some of these, Ibn Hanbal and Ibn Rāhwayh both mention a legal maxim on the authority of the Prophet: “The best of conditions is the one that fulfills the prerequisites for women being lawful to you.”

Mut’a marriage, or temporary marriage, is not lawful in Sunni Islam,³⁹ and Ibn Hanbal and Ibn Rāhwayh are both against it. So are Mālik and Shāfi‘ī. In the *Muwatta’*, there is a tradition on the authority of ‘Alī which says, in part, that the Prophet forbade *mut’a* marriage on the day of Khaibar. In another, ‘Umar says, upon being informed of a *mut’a* marriage, that if he had been present at it he would have had the couple stoned. In the *Mudawwana*, asked about a marriage that is to last for one month, Mālik is reported to have said that it was *mut’a* and void and that the Prophet forbade it.⁴⁰ Shāfi‘ī, on the other hand, after explaining that *mut’a* marriage is forbidden, goes on to say that as long as a specific time limit is not mentioned in the contract, either spouse, or both of them, may intend to remain married for only

³³ Both of these stories are in Abū ‘Abd Allāh Muhammad b. Isma‘īl Bukhārī, *al-Jāmi’ al-Sahih*, 3: 152. In the *Mudawwana*, 2: 172, Ibn Qāsim reports Mālik’s doctrine that a woman’s *wālī* cannot give her in marriage to himself or anyone else, without first naming the potential husband and obtaining her consent, and he reports his own doctrine that this is permitted, using ‘Abd al-Rahmān b. ‘Auf and Umm Hakim as an example. The *Mudawwana* actually calls this woman Umm Qāriz b. Shaiba, but see Stern, p. 81, and Ibn Sa’d, 8: 346. This problem of a man acting as both *wālī* and squire is neither in the *Muwatta’* nor in Shāfi‘ī, *Umm*, in the section on marriage. However, Ibn Qudāma reports that Shāfi‘ī said, about the problem of a woman’s paternal cousin who is also her *wālī* marrying her himself (see AD 23), that only the judge could act as her *wālī*, because anyone else the woman’s paternal cousin might delegate would be his agent (*wakīl*) and hence exactly in his position. See *Muwaffaq al-Dīn Ibn Qudāma*, *al-Mughnī*, 7: 260–262.

³⁴ See Schacht, *Origins*, pp. 182–183, for a discussion of the historical development of this maxim.

³⁵ However, Ibn Rāhwayh does refer to it in IK 252. See Wensinck, *Concordance*, s.v. “*wālī*,” and A. J. Wensinck, *A Handbook of Early Muhammadan Tradition*, s.v. “*Wālī*,” for fuller listings of instances of this tradition.

³⁶ See Shāfi‘ī, *Umm*, 5: 12; Mālik, *Mudawwana*, 2: 166, 171, 177. See also *Kutub iḥtiṭāf* Mālik wa’l-Shāfi‘ī in *Kutub al-umm*, 7: 222–223, where Shāfi‘ī accuses Mālik of inconsistency for making an exception in the case of a lowly woman.

³⁷ Mālik Ibn Anas, *Muwatta’ al-Shaibānī*, p. 221. See also EI, s.v. “*Nikāh*,” for the Hanafī position; Abū Yūsuf, #618; and Marghinānī, *Hedaya*, p. 34.

³⁸ See IK 18 and also IK 36, for a master’s retroactive validation of the marriage of a male slave. See AD 31–33, where Ibn Hanbal is against it. Mālik agrees with Ibn Hanbal and disagrees with Ibn Rāhwayh about retroactive validation of such a marriage: In the *Muwatta’*, he says the marriage is valid if the slave’s master gives his approval, and in the *Mudawwana*, Yahyā b. Sa‘īd al-Anṣārī is quoted as saying, “Here in Madina, . . . his master has the choice of either approving of such a marriage or rejecting it, and if he approves of it, there is no harm in that.” See *Muwatta’*, 3: 155, and *Mudawwana*, 2: 199–200. Shāfi‘ī does not discuss the possibility.

³⁹ *Mut’a* marriage may have been a frequent practice during the early decades of Islam. Opposition to it finally prevailed in Sunni, although not in Shiite Islam. Stages of transition can be discerned in the text of the Qur’ān and in *ḥadīth* and *fiqh* literature. In Qur’ān 4:24, the received text reads, *And those of whom ye seek content (by marrying them), give unto them their portions as a duty*. But Ubayy b. Ka’b, Ibn ‘Abbās, and Ibn Mas’ūd read before *give unto them their portions as a duty*, the words *for a definite period*. See Arthur Jeffery, *Materials for the History of the Text of the Qur’ān*, pp. 36, 126, 197. All *ḥadīth* collections have contradictory traditions on the subject; see Wensinck, *Concordance*, s.v. “*mut’a*.” See also *Shorter Encyclopedia of Islam*, s.v. “*Mut’a*,” and Schacht, *Origins*, pp. 266–267. For the Shiite doctrine condoning *mut’a* marriage, see Wilfred Madelung, “Shi‘ī Attitudes toward Women as Reflected in *Fiqh*.”

⁴⁰ Mālik, *Muwatta’*, 3: 153–154; *Mudawwana*, 2: 331–335.

a limited period, and this intention (*niya*) does not invalidate the marriage, because intentions are internal matters which are often not put into practice.⁴¹

Kafā'a

Women should be given in marriage only to men who are their equals. The most common constituents of "equality" (*kafā'a*) are religion, lineage, means, and freedom.⁴² Of these four, only religion is consistently important. Thus in IK 12, Ibn Hanbal and Ibn Rāhwayh say that a man who drinks wine is not a Muslim woman's equal in religion, although he may match her in lineage and means, and therefore a marriage between them is not valid. In IK 106, both Ibn Hanbal and Ibn Rāhwayh say a master cannot marry two of his slaves to each other if the woman is a Muslim and the man an unbeliever, even though both are slaves.

On lineage and means, Ibn Hanbal is equivocal. On lineage, for example, he says that even if an Arab woman is sickly, her *wali* should not give her in marriage to a non-Arab client (*maulā*). However, when Abū Dāwūd reminds Ibn Hanbal that the Prophet ordered Fātima bt. Qais, a divorced Quraishite, to marry his freed man, Usāma b. Zaid b. Hāritha, Ibn Hanbal points out, to mitigate Usāma's lowly status, that although his background was one of captivity, he was an Arab and hence her equal in lineage.⁴³ When Abū Dāwūd inquires about means, although Ibn Hanbal shows his unwillingness to commit himself fully by saying, "I do not know," he continues his answer with the story of Fātima bt. Qais, whom the Prophet told not to marry Mu'āwiya (who later became caliph) because Mu'āwiya was poor and such a marriage would be injurious to her maintenance and to provision for her children.⁴⁴ *Kafā'a* did not play an important role in either

Mālik's or Shāfi'i's doctrine. It is not mentioned in the *Muwatta'*, and in the *Mudawwana* considerations of *kafā'a* should not stand in the way of a woman who has been divorced from a husband originally not her equal and who wants to return to him. In *Kitāb al-umm*, it is discussed only in general terms.⁴⁵

The rules for *kafā'a* were worked out with the aim of upholding a woman's status by preventing her from marrying beneath herself. Such protection was not considered necessary for a man. Rather, discussion of appropriate marriages for a man revolved around working out situations based on the qur'ānic verses 4:25 and 5:5. Both verses mention the women whom a man should marry: first, free Muslim women and then, free Jewish and Christian women. Finally, a man may marry a Muslim slave woman, if he cannot afford to marry a free woman and fears he will commit fornication.⁴⁶ A man should not, therefore, marry Jewish and Christian women if they are slaves, but, in accordance with the Qur'an, Ibn Hanbal and Ibn Rāhwayh reiterate that he may marry them if they are free.⁴⁷ Ibn Hanbal also says that Jewish and Christian wives receive the same treatment as Muslim wives. Mālik and Shāfi'i did not differ from these views. In the *Mudawwana*, Ibn Qāsim reports that Mālik, because of verse 5:5, permitting it, said that although he did not like marriage with *dhimmi* women, he did not forbid it.⁴⁸ Shāfi'i, too, preferred that Muslim men not marry Jewish and Christian women, but he says such marriages are lawful, and he quotes verse 5:5 to prove it. He makes the same point that Ibn Hanbal does, that Jewish and Christian wives are to be treated exactly the way Muslim wives are.⁴⁹

Since the Qur'an indicates that marriage to a slave woman is appropriate only for a man who cannot afford to marry a free woman, questions arose about a man being married to a slave and a free wife simultaneously. In AD 11, Ibn Hanbal expresses his opinion by saying, "Most people find it reprehensible," when he is asked whether a man

⁴¹Shāfi'i, *Umm*, 5:80.

⁴²For the development of the idea of *kafā'a*, see *EL*, s.v. "*Kafā'a*"; Farhat Ziadah, "Equality (*kafā'ah*) in the Muslim Law of Marriage"; Schacht, *Introduction*, p. 162, and Russell and Suhrawardy, pp. 29–30. Lineage refers first to membership in the Prophet's tribe of Quraish, then to other Arabs, and finally to non-Arabs.

⁴³See AD 5–8. For the story of Usāma's marriage, see Ibn Qudāma, 7:376. For Usāma b. Zaid b. Hāritha and his father, Zaid b. Hāritha, see the articles on each of them in *EL*, and references there. Usāma was the son of Zaid and an Abyssinian freed woman. The Prophet seems to have been fond of Usāma, as well as of Zaid, and until his death in 54/673, Usāma was part of the Prophet's household.

⁴⁴See Ibn Hanbal, *Musnad*, 6:412, for two traditions in which the Prophet urges Fātima bt. Qais to marry Usāma rather than Mu'āwiya. This story is also in Mālik, *Musawwaf*, 3:209; also see Ibn Sa'd, 8:200.

⁴⁵In Kausaj's responses, Ibn Rāhwayh does not comment specifically on lineage and means.

⁴⁶See Ziadah; Mālik, *Mudawwana*, 2:170; and Shāfi'i, *Umm*, 5:15.

⁴⁷Qur'an 4:25: And whose is not able to afford to marry free, believing women, let them marry from the believing maids whom your right hands possess. . . . Qur'an 5:5: This day are (all) good things made lawful for you. . . . And so are the virtuous women of the believers who received the Scripture before you (lawful for you) when ye give them their marriage portions and live with them in honour. . . .

⁴⁸In IK 26, Ibn Hanbal and Ibn Rāhwayh agree that it is not lawful for a man to marry Magian women.

⁴⁹Mālik, *Mudawwana*, 2:306: "akrahū nikāhu nisā'a ahli'l-dhimma . . . wa mā uharri-mu." Mālik is concerned about the proximity of a Jewish or a Christian woman to her Muslim husband and their children, since she may drink alcoholic beverages and eat pork. However, he says, she cannot be forbidden to do either of these things.

⁵⁰Shāfi'i, *Umm*, 5:7.

who already has a free wife can, in addition, marry a slave. In IK, if a man marries a free woman and a slave woman by means of the same contract, Ibn Ḥanbal and Ibn Rāḥwayh both say his marriage with the free woman is valid, and he is separated from the slave. Further, they both say that if a man who is married to a slave wife marries in addition a free wife, he must divorce the slave. Their opinions are clearer if considered in juxtaposition with those of Mālik and Shāfiʿī on the issue of a man being married to a free wife and a slave wife at the same time. In the *Muwattaʿ*³, Mālik does not differ from Ibn Ḥanbal (in AD 11) that a Muslim man does not marry a slave wife as well as a free wife, unless, Mālik adds, the free wife wishes him to. He reasons that verse 4:25 said a Muslim man could marry a Muslim slave only if he could not afford the dower of a free wife and at the same time feared he might commit fornication. Neither of those conditions is present for a man who already has a free wife. In the *Mudawwana*, however, his position is different. Initially he said that if a man already married to a free wife married in addition a slave, he and the slave wife were separated; then, instead, he said that if such a marriage took place, the free wife was given the option of separating from her husband. Shāfiʿī's position is the same as Mālik's original one. He adds that such a marriage is invalid since it never should have taken place. Shāfiʿī also points out that a man's marrying a free wife in addition to a slave wife is different; there is no reason to end his marriage with the slave wife simply because his financial circumstances may have improved to the point where he can afford a free wife's dower.³⁰

Dower (*Ṣadāq*, or *Mahr*)

The verses in the Qurʾān about a woman's dower stress that it be given to her voluntarily (4:4 and 24; 5:5)³¹ and that she retain it in case of divorce (4:20).³² If divorce occurs before intercourse, the wife retains only half her dower, unless she agrees to forgo it (2:237);³³ if

³⁰See *Muwattaʿ*, 3:146; *Mudawwana*, 2:205; Shāfiʿī, *Umm*, 5:10.

³¹From the Qurʾān, 4:4: *And give unto the women, (whom ye marry) free gift of their marriage portions.* From 4:24: *And those of whom ye seek content (by marrying them), give unto them their portions as a duty.* From 5:5: *And so are the virtuous women of the believers [and the virtuous women of those] who received the Scripture before you [lawful for you] when ye give them their marriage portions and live with them in honour. . . .*

³²From 4:20: *And if ye wish to exchange one wife for another and ye have given unto one of them a sum of money (however great) take nothing from it.*

³³From 2:237: *If ye divorce them before ye have touched them and ye have appointed unto them a portion, then (pay the) half of that which ye appointed, unless they (the women) agree to forgo it. . . .*

a dower was not specified in the marriage contract (see below), the husband who divorces his wife before intercourse should give her a divorce gift (*mutʿa*), . . . *the rich according to his means, and the straightened according to his means, a fair provision* (2:236). However, there are no verses that provide general information about what should constitute an adequate or appropriate dower. Such information must be gleaned from stories in early *fiqh* and *ḥadīth* literature which indicate that in addition to money, a dower can be property, as well as anything else transferable from one person to another. Sometimes it can even be a pledge or a promise to do something.

In a particularly famous instance of the latter, the Prophet gave a woman in marriage to a man who could find nothing tangible to offer as a dower but who had memorized some verses of the Qurʾān which he could teach her. One version of this story is in Ibn Ḥanbal's *Musnad*. There, the narrator is Sahl b. Saʿd al-Sāʿidī, one of the Anṣār, who was with the Prophet when a woman entered and offered herself as a wife to the Prophet.³⁴ Then, one of the men present asked the Prophet to give her in marriage to him if the Prophet had no wish for her. When the Prophet asked the man if he had anything (i.e., to give the woman as a dower), the man said he did not, and the Prophet told him to search for something. The man found nothing, and the Prophet again told him to search for something, even if it were only a ring made of iron. This search was also unsuccessful, at which point the Prophet asked the man what he knew of the Qurʾān. The man mentioned some verses he knew by heart, and the Prophet said, "I hereby give you in marriage to her for what you know [and hence can teach her] of the Qurʾān."³⁵

The traditions that have the most bearing on the texts being examined here are those about the dowers received by the women of the

³⁴For women who gave themselves in marriage to the Prophet, see Qurʾān 33:50; also Ibn Saʿd, 8:107–115, the section titled "Women to whom the Prophet proposed, but with whom he did not consummate his marriages, and women who gave themselves to the messenger of Allah." Also, W. M. Watt attempts to provide a sociopolitical background for Qurʾān 33:50 in his *Excursus on Muḥammad's marriages*, *Muḥammad at Medina*, pp. 393–399.

³⁵Ibn Ḥanbal, *Musnad*, 5:330. Also see Mālik, *Muwattaʿ*, 3:128, for a slightly fuller version of the story and Zurqānī's commentary on pp. 129–130, where he explains that the best understanding of the words "what you know of the Qurʾān" is the one above, but that it is also possible to understand simply that the Prophet considered the man's knowledge of the Qurʾān particularly valuable and that a dower was either not mentioned or not part of this particular marriage. See IK 20, where Ibn Ḥanbal is not certain that the husband is automatically meant to teach his wife the verses of the Qurʾān he knows. Zurqānī also refers to other versions of this *ḥadīth*, for which see Wensinck, *Concordance*, s.v. "ṣadāq" and "mahr."

Prophet's family. Ibn Sa'd has a chapter on the dowers of the Prophet's wives, which contains eight traditions.⁵⁶ Half report 500 dirhams as the amount that both the Prophet's wives and his daughters received; the other half report 480 dirhams. 'Umar's name is associated with 480 dirhams; he is reported to have urged that women's dowers not be excessive and that the Prophet's example of giving his wives and daughters no more than 480 dirhams be followed.⁵⁷ In addition, in his biographical sketch of the Prophet's daughter Fātima, Ibn Sa'd has a tradition about her marriage to 'Alī b. Abī Tālib which says that in order to provide a dower for her, 'Alī sold a camel for 480 dirhams.⁵⁸

Turning to *ḥadīth* collections, we find five hundred dirhams as the dower the Prophet gave Khadija, as well as 'Ā'isha, Zainab, and Maimūna, and the dower Umm Habiba received when she was married to the Prophet, by proxy, from Abyssinia.⁵⁹ However, at least one tradition says that when Umm Habiba was given in marriage to the Prophet from Abyssinia, her dower was four thousand dirhams and that the Negus supplied it. This tradition goes on to say that the dowers of the Prophet's wives were four hundred dirhams.⁶⁰ The dowers of Juwairiya and Sāfiya are said to have been their manumission. Juwairiya, daughter of the chief of the Muṣṭaliq tribe, was captured when the Muslims raided the tribe in 6/627–628. The Prophet ransomed her and married her, at which point the men with the Prophet set free those of her relatives who had also been captured.⁶¹ Sāfiya, a member of the al-Nadīr tribe, was captured in the raid against Khaybar in 7/628. The Prophet redeemed her from one of his men and made her manumission her dower.⁶² Hers is the example usually mentioned to support the fact that a man who owns a female slave he

wishes to marry can make her manumission her dower, as long as the two actions are connected—that is, he cannot first free her and then, later on, turn her manumission into her dower.

Turning to *fiqh*, we find that Mālik does not refer to these traditions when discussing the appropriate amounts of money for dowers; rather he mentions amounts for a minimum dower.⁶³ Shāfi'ī makes an oblique reference to these traditions when he speaks of a maximum dower and says that he prefers that (*ahabhu ilainā*) a dower not exceed 500 dirhams, since that was the dower of the Prophet's wives and daughters.⁶⁴ Ibn Hanbal does not refer to them directly, but in the face of so many choices he does not fix on any particular amount, for either a minimum or a maximum dower. Perhaps he refers to them indirectly when he denies that Ibn Rāḥwayh said 500 dirhams was a fair dower. Turning to Kausaj's compilation, we see that in IK 25, Ibn Rāḥwayh does indeed deny the number 500 and in fact fixes on 480 dirhams as a maximum dower, because that is "what the Prophet established as his *sunna* for his daughters and his wives," thereby making an oblique reference to the traditions that say the Prophet's wives and daughters received 480 dirhams as dowers.

Whenever a marriage is concluded without mention of a specific dower, the wife receives a fair one, described by Ibn Hanbal as the dower the women in her family might expect to receive.⁶⁵ In a *tafwīd* marriage, for example, a contract is concluded without agreement on a dower, which is left for later settlement.⁶⁶ In such a marriage, the wife is presumed to be a *ṭhayyib*, and her *wālī* must obtain her consent before giving her in marriage. She may agree to be married for less than her fair dower (even, according to the *Mudawwana*, against her *wālī*'s wishes), but her *wālī* cannot take it upon himself to give her in

⁵⁶ Ibn Sa'd, 8:115–116.

⁵⁷ Ibid., p. 116.

⁵⁸ Ibid., p. 13. The Prophet then told 'Alī to use two-thirds of the money on perfume and the other third on clothing. However, in other traditions 'Alī's dower to Fātima is variously described, as a suit of armor, for example, or a few household appurtenances. Again, see the biographical sketch of Fātima in Ibn Sa'd, 8:11–20.

⁵⁹ See the traditions referred to in Wensinck, *Concordance*, s.v. "*ṣadīq*" and "*mahr*."

⁶⁰ Ibn Hanbal, *Musnad*, 6:427.

⁶¹ See Ibn Sa'd, 8:84, and Alfred Guillaume, *A Translation of Ibn Ishāq's "Sīrat Rasūl Allāh"*, p. 493. But also see Guillaume, p. 768, where Ibn Hishām tells a story of the Prophet leaving the raid with Juwairiya as captive and her father coming after them to ransom his daughter. The Prophet converted Juwairiya's father and his party to Islam. Juwairiya also converted, and the Prophet gave her father four hundred dirhams as her dower.

⁶² See EI, s.v. "Sāfiya," and references there.

⁶³ See *Muwatta'*, 3:133; *Muwatta' al-Shaibānī*, pp. 214–215. In the *Mudawwana*, Ibn Qāsim supports a minimum dower of one-quarter of a dinar; see 2:223–224. Also see Schacht, *Origins*, pp. 107–108, for the early development of the idea of a minimum dower.

⁶⁴ Shāfi'ī, *Umm*, 5:58.

⁶⁵ Shāfi'ī also describes a fair dower as the one the women of the bride's family might expect to receive; *ibid.*, 5:68. Mālik, in the *Mudawwana*, is reported as saying that to arrive at a fair dower for a bride required consideration of her individual qualities (beauty, wealth, etc.), rather than just the general circumstances of her female relatives, as well as consideration of the financial status of the groom; *Mudawwana*, 2:236.

⁶⁶ See Edward William Lane, *Arabic-English Lexicon*, s.v. "*f w d*," for the use of form 2 to refer to such a marriage. In the definitions for the active participle, *mufawwida*, Lane indicates that the term can refer to a woman who has agreed to forgo a dower, or a woman married without a dower having been named (the meaning in which the word *tafwīd* is used here), or a woman who has legally acquired power over the whole question of her dower.

marriage for less without her agreement.⁶⁷ If the marriage is consummated before a dower has been specified, the wife receives a fair one.

If a marriage is dissolved before consummation and before a dower has been specified, the wife receives a divorce gift (*muʿa*) in accordance with the Qurʾān (2:236). Ibn Hanbal will not be specific about the amount of such a gift; in IK, this particular issue is not considered.⁶⁸

Problems arose about the effects of a *tafwid* marriage when the husband died before the marriage was consummated. Discussion of these problems revolved around the case of Barwaʿ bt. Wāshiq al-Ashjaʿī, whose husband died before having intercourse with her and before specifying the amount of her dower. In AD 40, Abū Dāwūd asks Ibn Hanbal if he follows the traditions about her, and Ibn Hanbal says simply, "Yes." Turning to their *hadith* collections, we find that they each have several traditions about Barwaʿ bt. Wāshiq's husband. With slightly differing details, these traditions all relate that the Prophet ruled, after Barwaʿ' s husband died, that she receive a fair dower, wait an *ʿidda* on his behalf, and inherit from him as his widow.⁶⁹ Ibn Rāhwayh agrees.⁷⁰ Both Mālik and Shāfiʿ disagree. In the *Mudawwana*, Mālik's opinion is that when her husband dies before intercourse, the wife receives neither a dower nor a *muʿa* gift, but she does inherit from him. Shāfiʿ' s opinion is the same as Mālik's, but he adds that if, after the conclusion of the marriage contract, the husband has in fact specified a dower and then dies before having intercourse with his wife, she receives both this specified dower and her inheritance.⁷¹

When a dower has been specified and a marriage is dissolved before consummation, practical questions arise about the way in which it is to be halved. Ibn Hanbal chooses to halve the initial dower, regardless of what has become of it between the time the husband specified it and the time the marriage is dissolved. If, for example, it consists of a slave whom the husband has already given his wife and the slave has died, so the wife no longer has her dower, when the marriage is dissolved, she owes her husband half the price of the slave (see AD 41). If, on the other hand, when the marriage is dissolved, the slave has

already given birth to a slave son, so the wife has a larger dower (i.e., two slaves, instead of one), she still owes her husband half the price of the slave he gave her initially (see AD 42). Similarly, if he gave her a sum of money which she has augmented, she owes him only half of the original sum. Ibn Rāhwayh agrees.⁷² Shāfiʿ also says that a wife absorbs any increase or decrease in the value of the specified dower and returns to the husband only half of the original gift, but Mālik says that the spouses are associated together in the increase or decrease of the value of a slave, or indeed anything else the dower may have consisted of, from the time of the contract to the time of divorce before consummation, and that this is taken into account when the dower is halved.⁷³

If a couple have been alone together or, as it is stated in most texts on the subject, "whenever a door has been locked or a curtain drawn," intercourse is presumed to have taken place and the woman must receive a dower. The exception to this rule is a couple left alone at a time when intercourse is forbidden; during Ramaḍān, for example, or when the wife is menstruating, or when one or both parties are in a state of *ihṛām*.⁷⁴ If one or the other is fasting in any month besides Ramaḍān, however, privacy results in a presumption of intercourse. Ibn Hanbal and Ibn Rāhwayh both agree about this, except that Ibn Hanbal says that whenever the couple have been alone together, regardless of the circumstances, if the wife *claims* intercourse has occurred, a dower is obligatory, whereas Ibn Rāhwayh says this is not the case: "Locking the door and drawing the curtain do not oblige a husband to pay the dower when there is an impediment to sexual intercourse, caused by Ramadan, menstruation or *ihṛām*."⁷⁵

In these texts, every act of intercourse, lawful or not, requires a dower. Thus, for example, although a *shighār* marriage is not lawful,⁷⁶

⁶⁷ See Shāfiʿī, *Umm*, 5:68–89; Mālik, *Mudawwana*, 2:236. See also Ibn Qudāma, 8:46–47, and Russell and Suhrwardy, p. 73, the explanation for #197.

⁶⁸ See AD 46–49.

⁶⁹ See Abū Dāwūd al-Sijistānī, *Sunan*, Sulaimān b. al-Ashʿath on the margin of Mālik's *Muwattaʿa*, 2:189–190; Ibn Hanbal, *Musnad*, 4:279–280.

⁷⁰ See, for example, IK 228. Here, in the initial case, the Magian widow cannot inherit from her husband, as unbelievers do not inherit from Muslims. However, if she converts to Islam, her case is like that of Barwaʿ.

⁷¹ See *Mudawwana*, 2:238; *Muwattaʿaʿ al-Shaibānī*, pp. 222–223; Shāfiʿī, *Umm*, 5:68.

⁷² See IK 244. Several examples are given here which show (along with those in AD 42) that the wife is entitled to any augmentation of the value of the original dower which has occurred between the time of the marriage contract and the time of the divorce.

See also AA 160. AA 121 is a special case in which a woman has voluntarily returned her dower to her husband as a gift and therefore has no further claim on it.

⁷³ See Shāfiʿī, *Umm*, 5:61–62; Mālik, *Mudawwana*, 2:226–227. Also see Ibn Qudāma, 8:31–37 and 88–93, and Russell and Suhrwardy, p. 79, #215 and #216 and explanatory notes.

⁷⁴ For the several meanings of *ihṛām*, see the article in EI, s.v. "Ihṛām." Here the word refers to the state of consecration in which a Muslim performs either the pilgrimage or the *ʿumra*.

⁷⁵ See IK 210, and 303, where this information is repeated.

⁷⁶ A *shighār* marriage is one in which a man gives his daughter, or sister, in marriage to another, on the condition that he can, in turn, marry the second man's daughter, or

if it has taken place anyway and the couple have been alone together, the woman is owed a dower (see AA 25). Similarly, if a man marries a woman within the forbidden degrees, although there is no question that the couple are separated, if they have been alone together, the woman receives a dower.

If a Christian couple have been married for a dower of wine and then convert to Islam, if they have not yet had intercourse, the woman receives instead a fair dower for a Muslim woman of her rank. If, however, the couple have already had intercourse, their marriage would normally be allowed to stand.⁷⁷

Relationships That Forbid Sexual Intercourse and Marriage (*Radā*)

Relationships between a man and a woman that forbid sexual intercourse and marriage are described in the Qur'ān 4:22–23. These verses list the women whom a man is forbidden to marry as those related to him by consanguinity, foster-relationships (established through nursing), and affinity. They also mention those with whom he cannot cohabit simultaneously or sequentially. For example, a man may never marry his mother-in-law, but he can marry the sister of a former wife or a late wife. In pre-Islamic Arabia the only women forbidden to a man seem to have been his mother and sister, both consanguine and foster.⁷⁸ The Qur'ān extends those forbidden in the maternal line and adds to it those forbidden in the paternal line. It also includes relationships established by marriage. The changes specifically mentioned between pre-Islamic and Islamic practice are elimination of marriage with the former wives or widows of one's father and of marriage with two sisters at the same time, although it is not recommended that such marriages be dissolved if already in existence when the verses were revealed.⁷⁹

sister, and with the understanding that they both thereby avoid paying any dower. See Russell and Suhrawardy, p. 67, n. 2 for variations on this plan. See Wensinck, *Concordance*, s.v. "shighār," for traditions in which the Prophet forbade such marriages.

⁷⁷See IK 158. However, if only the wife converts to Islam before the couple have had intercourse, she receives no dower, but has the right to opt out of the marriage; see IK 125.

⁷⁸See *El*, s.v. "Radā," and Watt, pp. 280–281.

⁷⁹See IK 50 where Ibn Hanbal and Ibn Rāhwayh agree that a man cannot be married to two sisters at the same time, and Ibn Rāhwayh, after quoting the Qur'ān (4:23), mentions that Jacob was married to both Leah and Rachel. See *El*, s.v. "Ya'qūb," for post-qur'ānic information on Jacob's life. The story that he married Rachel only after Leah's death is an effort to bring his life into conformity with the rules established in the Qur'ān.

These texts deal mainly with particular problems that might arise in establishing the categories of women mentioned by the Qur'ān. One of the questions asked, although not usually directly, is whether marriage and lawful sexual intercourse with slave concubines create the same barriers. It turns out that they do: whatever rules apply to free women whom a man cannot lawfully marry, apply also to slave women. For example, since the Qur'ān forbids a man to be married to two sisters simultaneously, he cannot cohabit with two slave sisters simultaneously. Further, if he owns a slave woman and her daughter, he can have intercourse with only one of them, because marriage is forbidden with a mother and her daughter. Then, since marriage with one's mother-in-law is never possible, if he chooses to have intercourse with the daughter, he must never have intercourse with the mother.

Another question asked was whether illicit sexual relations create the same relationships as licit ones. Ibn Hanbal says that they do and assumes, for the purpose of creating relationships by marriage, that illicit sexual relations equal marriage. Thus if a man fornicates with a certain woman, he cannot lawfully marry her daughter, or if he commits adultery with a certain woman, neither his son nor his father can marry her. This view is not shared by Mālik and Shāfi'. In AA 23, Ibn Hanbal notes his disagreement with the Madinese: "The Madinese say, 'Whatever is forbidden does not forbid whatever is lawful.'" In IK 334, Ibn Rāhwayh explains this statement: "As for the doctrine, 'Whatever is forbidden does not forbid whatever is lawful,' it means that if a man fornicates with a woman with whom it is not lawful for him to have intercourse, his fornication has not made a woman with whom it is lawful for him to have intercourse, forbidden." Ibn Rāhwayh explains this statement in response to a question; he does not seem to support it (see IK 169).

Mālik does not use this statement in the *Muwatta'*, but he points out that the qur'ānic prohibitions apply to relationships established only through lawful intercourse: "Mālik said, '... and what Allah, in fact, forbade is [due to] lawful intercourse, or intercourse in a marriage that seemed lawful ('alā wajhi'l-shubhati bi'l-nikāh).'"⁸⁰

⁸⁰*Muwatta'*, 3:16. Also, in the *Mudawwana*, Sahnūn reports that he asked Ibn Qāsim whether a man's wife would be forbidden to him if he fornicates with the wife's mother or daughter, and Ibn Qāsim replied that although Mālik had said at one point that she would be, this was contrary to what Mālik said in his *Muwatta'* and to what he and his circle were all agreed upon (*Mudawwana*, 3:27).

Shāfi' says that an act of unlawful intercourse does not have the legal force to make something otherwise lawful, unlawful. (*Umm*, 5:25).

Other than fornication, Ibn Hanbal gives examples of extramarital lustful behavior which in itself is enough to produce an affinity between a man and a woman that acts as an impediment to future sexual relations between either of them and the other's lateral descendants.⁸¹ Ibn Rāhwayh does not comment specifically on this issue.

The pre-Islamic prohibition of marriage with a foster-mother or foster-sister, which was carried over into the Qur'ān, was extended and interpreted in traditions to the point where foster-relationship became an impediment to marriage in the same degrees as consanguinity.⁸² Chronologically, Ibn Hanbal and Ibn Rāhwayh come at the end of this development and on the basis of it work out some quite complicated questions about foster-relationship.⁸³ The main tradition behind the discussion is specifically mentioned only in IK 105, where al-Kausaj reports, "I said, 'Does nursing forbid what birth does?' Ah-mad [Ibn Hanbal] said, 'Yes. And the same holds true for [relationships established through] *laban al-fahl*.'" This response ends with Ishāq [Ibn Rāhwayh] saying, "It is as he said."⁸⁴

The creation of an artificial foster-relationship by nursing an adult is discussed in a number of traditions, where it is suggested as a way of circumventing the qur'ānic regulations secluding the Prophet's wives, or those against adoption.⁸⁵ The traditions that seem to support this practice tell of 'Ā'isha having a co-wife suckle an adult male whom she wished to treat as a nephew, or of a woman named Sahla, wife of the Companion Abū Hudhaifa, who told the Prophet that she and her husband had always regarded a certain man as their son and that since the institution of the *hijāb*, her husband had not allowed him into her presence. The Prophet suggested she nurse him and thereby actually make him her son. An equal number of traditions oppose this

practice. Many of them incorporate the legal maxim "Nursing requires hunger."⁸⁶ Others take up the questions of how many acts of nursing are required to create a foster-relationship and thereby suggest that a foster-relationship cannot simply be created by a single act of one adult nursing another. Ibn Hanbal supports these traditions, rather than those that seem to condone the creation of foster-relationships among adults; indeed he is very much opposed to it. Ibn Rāhwayh seems to be opposed also, but he approaches the question differently.⁸⁷

Witnessing a Marriage

A valid marriage should be witnessed, like any other contract, by two qualified male witnesses.⁸⁸ Although both Ibn Hanbal and Ibn Rāhwayh say this, they show just as much concern that a marriage actually be made public, that it not be a "secret marriage." Thus the problem of the validity of a marriage contract concluded without witnesses is usually discussed in connection with the problem of a secret marriage. A marriage that has not been properly witnessed may, in fact, be valid; a secret marriage never is.⁸⁹ Sometimes a secret marriage means one that has taken place with no witnesses or with inappropriate witnesses.⁹⁰ The expression is also used to mean a marriage

⁸¹ *Al-radd'a min al-majd'a*. See Wensinck, *Handbook*, s.v. "Nursing," for documentation of these traditions. See Stern, pp. 99–103, for details of several of the better-known stories of foster-relationships being established between adults.

⁸² See AA 66, 67. In IK 90, Ibn Rāhwayh tries to make a coherent statement about how many acts of nursing create a foster-relationship, and he seems to be against the establishment of such a relationship through token acts of nursing (such as those engaged in by adults simply to create them), although he does not come right out and say so. See John Burton, I, *The Collection of the Qur'an*, pp. 87–89, and John Burton, *The Sources of Islamic Law*, pp. 156–158. In *Sources*, in his discussion of the issue of how many acts of nursing create a foster-relationship, Burton shows that the conflicting opinions about the subject can be understood as an example of *naskh* (the abrogation of a qur'ānic verse, or verses). This particular issue belongs to the third mode of *naskh* that Burton describes: the abrogation of a particular verse, or verses, without the abrogation of the ruling.

⁸³ See EI, s.v. "Shahāda" and s.v. "Shāhid."

⁸⁴ On the history of the feeling among the Arabs against secret marriages, see Ignaz Goldziher, "Über Geheimhehen bei den Arabern."

⁸⁵ We find in the *Muwatta'* a tradition in which 'Umar, when told of a marriage contract concluded with only one man and one woman as witnesses, said, "This is a secret marriage and I do not allow that. Had I been here for it, I would have stoned [them]" (*Muwatta'*, 3: 144). Shāfi'i also relates this tradition, but he uses it to show that a marriage which has taken place without two *just* witnesses is invalid (*Umm*, 5: 22).

⁸¹ See Ibn Qudāma, 7: 486–488, and Schacht, *Introduction*, p. 163, for the Hanafi attitude toward lustful behavior.

⁸² Further, relationships by marriage became incorporated into the sphere of foster-relationships. See EI, s.v. "Radā", and Schacht, *Origins*, pp. 194–195. For traditions on the effects of nursing, see Wensinck, *Handbook*, s.v. "Nursing," and Wensinck, *Concordance*, s.v. "radā'."

⁸³ For a full description of possible foster-relationships, see Russell and Suhrawardy, pp. 288–297.

⁸⁴ *Laban al-fahl* is a technical term used in the context of establishing foster-relationships. See Schacht, *Origins*, p. 194, n. 4, where he says of *laban al-fahl*: "The milk on which one child was suckled was produced by the same *semen genitale* by which the other child was begotten."

⁸⁵ For the seclusion of the Prophet's wives and the institution of the *hijāb*, see the article in EI, s.v. "Hijāb." For the prohibition of adoption in Islam, see Schacht, *Introduction*, pp. 14 and 166; see also EI, s.v. "Zaid b. Haritha."

that has not been made public, regardless of whether it has been witnessed.⁹¹ This is the way a secret marriage is defined in IK 152 where al-Kausaj asks, "What constitutes a secret marriage?" and Ibn Hanbal replies, "One that is not made public, even though the couple were married to each other by *walīs*." And in AA 5, when 'Abd Allāh specifically asks, "If there are two witnesses and a *walī*, is it a secret [marriage]?" Ibn Hanbal replies, "It is preferable that a marriage be made public and not be secret, that it be with a *walī* and that musical instruments be played at it, so that it becomes well known and acknowledged."⁹² As we saw above, he defines a valid marriage as one that includes "a suitor, someone to give the bride in marriage and two witnesses." However, when asked, he is unwilling to say outright that either a secret marriage or one concluded without witnesses is invalid, only that it is preferable that a marriage not be secret and that it is preferable that it be concluded in the presence of witnesses. Ibn Rāhwayh adopts the same tone as Ibn Hanbal about a marriage that has not been properly witnessed. In IK 318, he indicates that if a marriage has taken place with only one woman as a witness, it is valid if it is widely known to have taken place and the husband does not deny it, but he also says that a valid marriage requires two witnesses, or two women and one man.⁹³

Despite the concern shown in these texts for avoiding a secret marriage, they do not mention one of the most important ways of publicizing one—the *walīma*, or wedding banquet, given by the bride-

groom after the bride has been brought to his home or after the marriage has been consummated.⁹⁴

Divorce (*Talāq*)

One cannot speak of an "ideal" divorce the way one does of an ideal marriage, but a "normal" divorce, or perhaps an "appropriate" one, is usually referred to as "divorce in accordance with the generally accepted practice" (*talāq al-sunna*). What emerges is that a man who wishes to divorce his wife should do so at the end of one of her menstrual periods without resuming sexual relations with her.⁹⁵ His wife then begins to wait an 'idda,⁹⁶ to ascertain whether she is pregnant. Her 'idda lasts three menstrual cycles, or three months if she does not men-

⁹¹See Stern, pp. 89–91, for stories about wedding banquets held by the Prophet and several of the Companions. See Wensinck, *Handbook* s.v. "Walima" and Wensinck, *Concordance*, s.v. "walima," for references in *hadīth* literature to the wedding banquet. For example, an invitation to a wedding banquet should not be declined: "The Prophet said, 'When any one of you is invited to a wedding banquet, let him attend'" (Mālik, *Muwatta'*, 3:161). For this tradition see Wensinck, *Concordance*, s.v. "Walima," and references there for other instances of it.

The wedding banquet which marked the Prophet's marriage to Zainab bt. Jahsh is associated with the introduction of the *ḥijāb* (Qur'an 33:53). Some of the guests may have behaved inappropriately. See Nabia Abbott, *A'isha, the Beloved of Muhammad*, pp. 20–21, and Watt, pp. 284–285.

⁹²This timing of *talāq al-sunna* is referred to in the only response in these texts in which it is mentioned explicitly: in IK 63, Kausaj reports that when he asked what *talāq al-sunna* was, Ibn Hanbal replied, "That a man divorce his wife during a period of purity without having had intercourse with her, the way the Prophet ordered Ibn 'Umar to divorce his wife: in a period of purity, without having had intercourse with her." Ibn Hanbal's reference to Ibn 'Umar in this context is to remind Kausaj of Qur'an 65:1, in which men are urged to pronounce a divorce in a way that will make it easy to reckon the divorced wife's 'idda. Qur'an 65:1 elucidates 2:228. It was either revealed to the Prophet as guidance with regard to Ibn 'Umar's case or the Prophet quoted it to 'Umar when he inquired about his son's divorce. See Richard Bell, *A Commentary on the Qur'an*, 2:393.

Ibn 'Umar had divorced his wife while she was menstruating and 'Umar then asked the Prophet about his son's divorce. The Prophet gave instructions that Ibn 'Umar return to his wife and wait to divorce her until he could do so when she had just completed a menstrual period and before he had resumed sexual relations with her. For this story of Ibn 'Umar's divorce, see, for example, Abū Dāwūd, *Sunan*, 2:208–210. Abū Dāwūd records a number of traditions that tell the story of Ibn 'Umar's divorce. See also Bukhārī, *Sahīh*, ch. 1 of *Kiṭāb al-talāq* on *talāq al-sunna*; Nasā'ī, *Sunan*, *Talāq al-sunna*, 6:140; EI, s.v. *Talāq*.

⁹³An 'idda is the period of time a divorcée or a widow waits before she can remarry (see index).

⁹¹In Mālik, *Mudawwana*, 2:194, for example, Zuhri is reported as saying that the couple involved in a secret marriage are separated and then punished, along with the witnesses of their marriage.

Shāfi'i says that if witnesses participate with a couple in keeping their marriage secret, the marriage is valid and the secrecy is reprehensible. (*Umm*, 5:22).

⁹²In Mālik, *Mudawwana*, 2:194, Ibn Wahb relates a tradition about the Prophet and several Companions passing by the dwellings of the Banū Zuraiq and hearing singing and musical instruments. Upon inquiry, the Prophet is told a marriage is taking place, and he approves and says that if the tambourine is heard and smoke is seen [presumably for the preparation of food for a wedding banquet], the marriage is not a secret one. Several other traditions here relate to the kinds of instruments that are played to make a marriage public.

In the same vein, a tradition found both in Nasā'ī and Tirmidhi has the Prophet say, "The difference [in a marriage] between *ḥalāl* and *ḥarām* is playing the tambourine. See Ahmad b. Shu'ayb al-Nasā'ī, *Sunan*, 6:127, and Muhammad b. 'Isā al-Tirmidhi, *Sunan*, 2:275. Tirmidhi does not include the words "in a marriage" (*fī'l-nikāḥ*).

⁹³Further, in IK 318, it is interesting to note that Ibn Rāhwayh reports that the Mālikī doctrine, as well as the doctrine of some Iraqīs is that public announcement of a marriage makes it valid, regardless of whether it has been witnessed.

struate due to age or illness. If she is pregnant, her delivery ends her *'idda*. At any time during a woman's *'idda*, her husband is free to return to her. Once her *'idda* has ended, she is divorced from her husband. The couple can remarry on the basis of a new contract and a new dower, but they can do this only twice.⁹⁷ That is, a man is permitted to divorce and then return to his wife twice, but if a couple are divorced a third time, they cannot remarry unless the wife has first been married to and consummated a marriage with another man. This is also the case if a husband has returned to his wife during her *'idda* after the first two times he divorced her. The third time, the divorce is final.⁹⁸

The statement a man makes to his wife to pronounce a divorce is, "You are divorced," or *'anti ṭaliq*."⁹⁹ However, there are a number of other statements he can make that also effect divorce, but these seem to require clarification. Early scholars discussed these statements at length and gave an enormous amount of attention to which of them effected single, which double, and which triple or final divorces, and whether and under what circumstances the speaker's intention was to be taken into account. These discussions are often so intricate that it is difficult to sort them out, and in these texts the difficulty is compounded by the compressed presentation of the questions and answers. Discussion of the statements a man makes to effect divorce can be divided into ten categories:¹⁰⁰

In the first category are those statements that clearly result in divorce, such as statements that include the use of a word with the root letters *ṭ l q*, as well as those that do not include such a word but are treated as unambiguous circumlocutions. In the second category are ambiguous circumlocutions that result in divorce only if the speaker intended them to. Discussion of both these categories includes the

⁹⁷ For the procedure by means of which a couple return to each other, see IK 162.

⁹⁸ See Qur'an, 2:229–230, but also Schacht, *Origins*, p. 195, n. 1, and references cited there.

The practice of having a woman marry and immediately divorce a man in order lawfully to remarry a husband from which she has been triply divorced is called *ṭahīl*. Under some circumstances, it is lawful; neither Ibn Hanbal nor Ibn Rāḥwayh approves of it. See AD 176; IK 253. For *ṭahīl*, see EI, s.v. "*Ṭalāq*."

⁹⁹ *Ṭaliq*, "divorced," is an adjective that applies only to females and hence does not form a feminine with *ṭā' marbūṭa*. See W. Wright *A Grammar of the Arabic Language*, 1:187. *Ba'in*, without a feminine ending, meaning "separated or cut off," is also used of a divorced woman. Also see Lane, s.v. "*b y n*."

¹⁰⁰ These categories are not formal ones and do not necessarily represent the way the material is divided up in different works of *fiqh* or the way it is discussed in other secondary sources. They do, however, seem useful for bringing order out of the large number of responses in these texts that deal with statements of divorce.

question of whether these statements effect single, double, or triple divorce, and whether the speaker's intention is to be taken into account. The third, fourth, and fifth categories all consist of statements that are treated as oaths, that is, as commitments to future action. A man can be released from an oath either by fulfilling it or by expiating it with a compensatory action. In the third category are, for example, conditional statements by means of which divorce is made dependent upon the occurrence of a future event or upon ascertaining whether a certain fact is true. The fourth category consists of general statements such as "Any woman I marry is divorced." In the fifth category are statements including the words "God willing" (i.e., making an exception: *istithnā'* or *thunyā'*). Then, sixth, there is silent divorce, when a husband does not utter a divorce aloud but thinks it; and seventh, a divorce statement made under coercion. Category eight contains questions not about the nature of the divorce statement per se but about the status or condition of the husband who makes the statement. Category nine concerns the divorce of the husband who is terminally ill. Category ten addresses the question of whether the sale of a married female slave automatically results in her divorce.

In the first category, a man can say to his wife, "You are divorced" (*anti ṭaliq*) and thereby effect a single divorce. But, Ibn Hanbal is asked (AD 70), what if such a man intended by his statement to divorce his wife triply? Ibn Hanbal answers that the statement "*Anti ṭaliq*" effects a single divorce only, and he goes on to indicate that, in his view, a man must say out loud what kind of divorce he means to pronounce; he cannot just think it.¹⁰¹ On the other hand, a man who makes a statement that his wife is divorced half a divorce is divorced one full single divorce, and Ibn Hanbal refuses to consider his intention at all.¹⁰²

Also in the first category is the statement "You are divorced triply in accordance with the *sunna*" (*anti ṭaliqun thalāthan lil-sunna*). This, Ibn Hanbal says, effects a triple divorce all at once, since prohibition of this practice was not part of the definition of *ṭalāq al-sunna*: "The Prophet did not specify single, double, or triple divorce, therefore a triple divorce pronounced all at once during a period of purity is valid."¹⁰³

¹⁰¹ See also Russell and Suhrawardy, nn. to #470, pp. 159–160, and to #499, p. 172.

¹⁰² AD 96. See Russell and Suhrawardy, pp. 174–177, for discussion of fractions of divorce.

¹⁰³ IK 63. The fact that it is valid is separate from the fact that Ibn Hanbal did not approve of triple divorce in one session. In AD 67, Abū Dāwūd says, "I heard Ahmad asked about a man who divorces his wife triply, that is, with one utterance, and he did not consider that appropriate."

Among the statements a man can make that do not include a word with the letters *ṭ l q*, but that do effect divorce are "*Anti khalīya*," "*Anti bariya*," and "*Anti bā'in*."¹⁰⁴ These three are usually mentioned together. There is no disagreement that if he makes one of these statements a man has pronounced a divorce; the question is how many? Ibn Ḥanbal's answer is that each of these statements effects a triple divorce, although he is reluctant to consider them at all.¹⁰⁵

Divorce statements including the word *batta* (*ṭalāq al-batta*), whereby a man says to his wife, "*Anti ṭalāq al-batta*,"¹⁰⁶ are sometimes discussed with *khalīya*, *barīya*, and *bā'in* divorces, but sometimes on their own because of the traditions devoted to them, most especially those concerning the Companion Rukāna b. 'Abd Yazid, who is said to have divorced his wife in such a way that he thought the divorce was final. Rukāna later regretted his move and appealed to the Prophet, who told him he had not divorced her finally and could return to her. There are many traditions about Rukāna and the details of his divorce; all say that he returned to his wife. In AD 74, Abū Dāwūd asks Ibn Ḥanbal whether a tradition about Rukāna establishes the fact that he divorced his wife using the word *batta*. Ibn Ḥanbal says it does not and refers to another tradition that says Rukāna divorced his wife triply. Then Ibn Ḥanbal remarks that the Madinese call divorce with *batta* triple divorce. By saying this, Ibn Ḥanbal makes the traditions about Rukāna of no use for deciding what *batta* means, since all traditions agree that he did return to his wife. However, Ibn Ḥanbal himself tends to support the view that divorce with *batta* is like *khalīya*, *barīya*, and *bā'in* divorces. Ibn Rāhwayh does not agree and favors asking the husband who divorces his wife with *batta* what he meant. Ibn Rāhwayh says this is what the Prophet did when Rukāna divorced his wife with *batta*. He said to Rukāna, "What do you mean by that?"¹⁰⁷

¹⁰⁴ *Khalīya* and *barīya* can both be translated as "free." For fuller definitions of these words, see Lane, s.v. "*ḥ l w*" and "*ḥ r*" (consistently written without hamza in these texts). For *bā'in*, see root *b y n*. The masculine is often used for the feminine here. See above, n. 99.

A man can also say, *anā minkī barīya*, or *khalīya*, or *bā'in*. See Mālik, *Mudawwana*, 2:396.

¹⁰⁵ His view that these are triple divorces is separate from the fact that he does not approve of them. For example, in AD 71, he indicates this disapproval by saying, "I avoid saying anything about them, [but] I fear that [each one] is triple." Abū Dāwūd adds, "Perhaps I heard Ahmad say, 'I do not give a *fatwā* on this matter.'"

¹⁰⁶ He can also say, *anā minkī ḥalīn*. See Mālik, *Mudawwana*, 2:396. *Al-battala* or *ḥīl-battala*, meaning "definitely," or "decisively." See Lane, s.v. *b t t*, which means "to cut off," "sever," or "separate."

¹⁰⁷ See IK 315. See Abū Dāwūd, *Sunan*, 2:213–217, for a representative selection of traditions about Rukāna. In some, triple divorce in one session is said to count only as

Other statements that Ibn Ḥanbal says effect triple divorce whenever a husband pronounces them against his wife are "You have free rein"¹⁰⁸ and a statement that includes a prohibition, such as "You are forbidden to me; I mean by this divorce."¹⁰⁹ Statements that effect a single divorce are "I have no wife," and "I make you a gift to your family." This latter, Ibn Ḥanbal says, results in a single divorce only if a woman's family accepts her; if not, the words have no legal consequences. The statement "Begin an 'idda" effects a single divorce unless a man says it three times in a row and thereby intends a triple divorce. "You are divorced like this house" is a single divorce, unless by saying it the speaker intends to be permanently separated from his wife.

Statements in the second category, those that effect divorce only if the speaker intends them to, are "Get out!" "Go!" "Join [your family]!" and "You are free." These, Ibn Ḥanbal says, effect triple divorce, along with "Choose!" and "Your matter is in your hands." If these last two are uttered harshly, they are like *khalīya*, *barīya*, and *bā'in* divorces.¹¹⁰

"Go marry whom you wish!" is a divorce pronouncement if the speaker intends it as such. Ibn Ḥanbal does not specify single or triple. The Persian word, *bahishtam*, Ibn Ḥanbal says, effects a triple divorce if the speaker intends it to. If he means instead to lie, it effects at least a single divorce.¹¹¹ If a man has pronounced a divorce, but does not know whether he meant it to be single, double, or triple, his statement effects a single divorce at least, but the couple do not separate until the husband ascertains what he meant.

In these examples, as well as in the ones that follow, Ibn Ḥanbal makes no effort at any systematic ordering of the various statements

a single divorce; in others, the Prophet made divorce with *batta*, a single divorce. Mālik held that divorce with *batta* was triple and definite. See *Muwatta'*, 3:166, and *Mudawwana*, 2:396–398. Shāfi'i's view is the same as Ibn Rāhwayh's; Rukāna was asked what he meant to do. See *Umm*, 5:261.

See Schacht, *Origins*, pp. 146–147 and 196–197, for a discussion of the historical development of the meaning of divorce with *batta*.

¹⁰⁸ Literally "the rope is on your withers" (*al-hablu 'alā ghāribikī*). The image is of an animal no longer being guided by a bridle rein or halter rope.

¹⁰⁹ See AD 74. But see also AD 77, 78: without the words "I mean by this divorce," "You are forbidden to me," is a statement of *ṣḥāḥ*.

¹¹⁰ Otherwise "Choose!" and "Your matter is in your hands" are two statements a man makes to give his wife the opportunity of initiating divorce (see below).

¹¹¹ See IK 324. *Bahishtam* is Persian for "I dismissed" or "I left." In IK 65, Ibn Ḥanbal says a statement in Persian does not have the clarity of one in Arabic; therefore one must ask the speaker what he meant. Ibn Rāhwayh says the speaker must be asked what he meant, in any case.

under consideration. His concern for morally upright behavior shows through in his insistence that men be held fully accountable for their statements and not be allowed to say one thing and intend another. He is not consistent, however, and in response to questions about several statements, he says the speaker's intention must be ascertained. Ibn Rāḥwayh's approach is markedly different and completely consistent: if there is any doubt about the meaning of a divorce statement, that doubt is resolved by asking the husband what he intended, regardless of what he did or did not say.¹¹²

In the third category are declarations on the part of a husband that make divorce contingent upon the fulfillment of a condition. Such declarations are treated as unilateral oaths, and divorce occurs when the condition stipulated obtains.¹¹³ Included in this category are conditional statements on the part of a husband that his wife is divorced "if" (usually *in*, sometimes *idhā*) a certain thing happens.¹¹⁴ Such statements can be either positive or negative. If a man makes a positive statement, he swears that divorce is contingent upon performance of a future action of his, or of his wife's. Then, as long as neither of them performs this particular action, they remain married and the husband is true to his oath (*barra*). However, if he, or she, performs the action, he thereby breaks his oath (*hanitha*) and is divorced.¹¹⁵ In discussing this kind of oath, Ibn Hanbal, now in agreement with Ibn Rāḥwayh, is concerned mainly with ascertaining more precisely the husband's intentions. For example, in an oath discussed in AA 152, divorce is made contingent upon a future action of the wife. The husband says, "If you go out of the house without my permission or knowledge, you are divorced." 'Abd Allāh asks his father whether it counts as a divorce if the wife goes out and forgets to inform her husband afterward, as well as if she goes out and remembers to inform him. As the problem is presented to Ibn Hanbal here, the wife has gone out twice, but the husband, who knows of only one of her outings (and the consequent divorce), returned to her during her *'idda*. The point of the question is whether the couple have been divorced once for the outing

the husband knows about, or twice, because there was also one he does not know about. Ibn Hanbal's answer is that whether one or two divorces occurred depends upon the husband's intention when he made his declaration: "If he [the husband] meant by his statement that his wife is divorced whenever she goes out, then each time she went out, she was in fact divorced. But if he meant by his statement just that one time, then the marriage has only one divorce behind it."

If a man makes a negative statement, so that divorce is thereby contingent upon his or his wife's not performing an action, he is in the position of breaking the oath from the instant he makes the statement.¹¹⁶ Again, Ibn Hanbal is concerned with ascertaining more precisely the husband's intentions. Thus, if a man says, "If I do not leave Baghdad, you are divorced," he is asked how long he intends his statement to be in force. Once a time limit is established, the marriage continues for its duration.¹¹⁷ The marriage is immediately suspended, however, if a man makes a statement whereby divorce is contingent upon the truth of a certain fact. Since the fact might be true from the instant the husband makes his statement, he is potentially in the position of breaking an oath as soon as he has uttered it. Thus, if two men see something fly by, and one says his wife is divorced triply if it was not a bird and the other says his wife is divorced triply if it was not a crow, both abstain from having intercourse with their wives until the matter is clarified.

When divorce is made contingent upon the wish of a third person that it take place, as is the case when a man says to his wife, "You are divorced triply, if a certain person (*fulān*) wishes you to be," then should it turn out that that person does wish her to be, divorce takes place as soon as his wish is verified.¹¹⁸ Finally, divorce can be made contingent upon the occurrence of a particular event. So, if a husband says to his wife, "If you bear a girl, you are divorced," divorce takes place if she does indeed bear a girl.¹¹⁹

¹¹² See IK 317, where Ibn Rāḥwayh insists that if a husband intended to divorce his wife but did not say so aloud because another man covered his mouth, he is still divorced, because he intended to be.

¹¹³ See *El*, s.v. "*Kasam*," for this kind of extrajudicial oath, especially used in divorce and manumission. See also Schacht, *Introduction*, pp. 117 and 159.

¹¹⁴ See Mālik, *Mudawwana*, 3:2-3, where Mālik is reported to have felt initially that a statement with *idhā* was stronger than one with *in*, but then changed his mind and said they were the same. The protasis and apodosis in these statements can be reversed.

¹¹⁵ See Mālik, *Mudawwana*, 3:2-12, where many of these statements are discussed. For example, "You are divorced if you enter the house," or "if you speak," or "if you sit down," or "if I enter the house."

¹¹⁶ See *El*, s.v. "*Kasam*" again, and Russell and Suhrwardy, n. 2 to #431, pp. 144-145.

¹¹⁷ See AD 152 and again *El*, s.v. "*Kasam*," and Russell and Suhrwardy, n. 2 to #421, pp. 144-145. In AA 117, Ibn Hanbal establishes time limits within which intercourse will not affect the husband's oath. Mālik insists that a marriage be suspended in the case of a negative oath; *Mudawwana*, 3:8. But see also Russell and Suhrwardy, #556 and #557 and nn. to these.

¹¹⁸ AD 98. See also Russell and Suhrwardy, nn. to #563, where they say a positive oath regarding a future action on the part of a third person is like a positive oath regarding a future action on the part of one of the spouses.

¹¹⁹ IK 181. Here, the rest of this statement is "and if you give birth to a boy, you are doubly divorced." Ibn Hanbal thinks that when the first condition obtains, the second becomes irrelevant.

In this category also belong statements that make divorce contingent upon the arrival of a future time. These statements raise questions about precisely when that time has arrived. "You are divorced in a month" effects a divorce the instant the next month starts. "You are divorced on *lailat al-qadr*" requires attention to exactly when *lailat al-qadr* falls.¹²⁰

Although Ibn Hanbal and Ibn Rāhwayh seem to discuss quite a number of divorce statements that take the form of conditional oaths, other texts, in fact, record many more. The oath statements found in these collections of responses are only a representative sampling.¹²¹ Whenever they both comment on a specific oath of divorce, they are in agreement with each other.

The length of time such oaths stay in effect depends upon whether they involve a negative or positive condition. If a man has sworn a negative oath to divorce his wife, the oath ends either when the time limit ends or when he performs the action. In the case of a positive oath, if he wishes it to end, he can expiate it; otherwise, as far as Ibn Hanbal and Ibn Rāhwayh are concerned, it is permanent. Thus, even if the couple divorce and then remarry after an intervening marriage of the wife's with another man, the oath the husband swore remains potentially in effect.¹²²

If a man forgets whether he has taken an oath to divorce his wife if he does (or does not) do something, Ibn Hanbal says he is bound by his oath; Ibn Rāhwayh says he is not.¹²³

The fourth category consists of the oath "Every woman I marry is divorced," which was discussed extensively in early *fiqh* texts, along

with its variants such as "If I marry a certain woman (*fulāna*), she is divorced," "Every woman I marry from this town (or village, or tribe) is divorced," and "Every woman I marry within the next forty years is divorced."¹²⁴ Ibn Hanbal and Ibn Rāhwayh reject all of these statements. They do not think they are valid oaths, and they do not think that on the basis of having sworn one of them, or a combination of several of them, a husband should be divorced from any woman he marries. Although they do not say so directly, behind their denial of the validity of these oaths is a *ḥadīth* on the authority of the Prophet which says, "There shall be no divorce before marriage and no manumission before possession."¹²⁵

The fifth category, the statement "You are divorced, God willing," is usually discussed in terms of two issues. The first is whether the clause "God willing" (a statement of *istiḥnā* or *ṭhunyā*) is permissible, and the second is whether divorce occurs if it is, or if it is not. There are, roughly, three positions taken. The first, Ibn Hanbal's, is that the clause is not permissible, and therefore divorce takes place. That is, the clause "God willing" is invalid, but the statement "You are divorced" is not.¹²⁶ The second position is also that it is not permissible but that both clauses are thereby invalid and, as a consequence, divorce does not take place.¹²⁷ The third position, taken by Ibn Rāhwayh, is that it is permissible. That is, both clauses are valid, and

¹²⁰See Mālik, *Mudawwana*, 3: 18–19, for more variants on these statements.

¹²¹For the tradition, "No divorce before marriage and no manumission before possession," see Wensinck, *Concordance*, s.v. "*ṭalāq*," for listings. It is in most of the major collections; listings can also be found under "*ṭiq*" (manumission). Sometimes it is enlarged to include "... and no sale before ownership." See Abū Dāwūd, *Sunan*, 2:210, *ṭalāq*, 7, for another addition.

Mālik does not use this tradition and thinks that although the general oath "Every woman I marry is divorced" is not valid, several more specific versions of it are. In the *Muwattaʾ*, for example, there are two traditions on the authority of several Companions and Successors who are reported to have held that when a man swears to divorce a particular woman before marriage, if he marries her, he is indeed divorced from her, and Mālik says this is the best he has heard about this matter. See *Muwattaʾ*, 3:214–215. Further, in the *Mudawwana*, he is reported to have explained that although general oaths such as "Every woman I marry is divorced" are not valid, those that seem more precise are so—such as "Every woman I marry except one from Fustat is divorced," as well as "Every woman I marry in the next forty years is divorced" (but only if the man is young enough to be expected to live that long; if he is too old for it to be reasonable to expect him to live for forty years, his oath is not valid). See Mālik, *Mudawwana*, 3:18–19, for further details.

Shāfiʿi's doctrine is clearly identical with that of Ibn Hanbal and Ibn Rāhwayh rather than with that of Mālik, since a valid divorce requires first a valid marriage. See *Umm*, 5:251–252.

¹²⁶This is also Mālik's position. See *Mudawwana*, 3:16.

¹²⁷This is Shāfiʿi's view. See *Umm*, 5:187.

¹²²See AD 100 and 101. In IK 73, Ibn Hanbal makes a general statement about oaths contingent upon time. See EI, s.v. *Ramādān* and "*ṭalāq*," for *lailat al-qadr*. Some Muslims believe that *lailat al-qadr* is one of the last nights of the month of s.v. *Ramādān*. There is no unanimity on which night it is, however, and Abū Hanīfa is said to have held that *lailat al-qadr* did not fall at this time.

¹²³See Russell and Suhrwardy, ch. ix, "The Constituents of Repudiation," for even more of these oaths. See also Ibn Qudāma, 8:265–470, for an almost exhaustive treatment of them.

¹²⁴It is interesting to note that Mālik's view is different. He says such an oath ceases with the marriage in which the husband swore it. That is, the oath belongs to that particular state of ownership (*dhālīka'l-mulk*), and when it ends, the oath ends. Shāfiʿi agrees with Mālik. See Mālik, *Mudawwana*, 3:10, and Shāfiʿi, *Umm*, 5:188.

¹²⁵See AD 150; IK 329, 332. See Russell and Suhrwardy, p. 144, n. 1 to #430, for a tradition on the authority of the Prophet that says, "My people are not liable for mistakes, forgetfulness, and things done under coercion." See Wensinck, *Concordance*, s.v. "*Nasiya*," for traditions about making mistakes and forgetting in divorce.

IK 175 is garbled, but there Ibn Hanbal says that divorce pronounced in jest is valid, and Ibn Rāhwayh says that it is not. See Abū Dāwūd, *Sunan*, 2:212, *ṭalāq* 9, for a tradition against jesting in marriage, divorce, and return.

therefore divorce does not take place, since divorce is based on the husband's intention, and by saying "God willing" he abdicates formulating his own intention and therefore does not wish to be divorced.

The sixth category, divorce statements that a husband only thinks and does not pronounce aloud, Ibn Hanbal says, has no legal consequences. Ibn Rāhwayh would seem to disagree and, as usual, to favor ascertaining the man's intentions.

The seventh category is divorce under coercion, and Ibn Hanbal comments on it by saying, "On that, I follow the *hadīth* of Thābit al-Ahnaf, that is, of Mālik b. Anas regarding the divorce of a man who is tortured or beaten" (see AA 125). Turning to the *Muwattaʿa*, we find Mālik relating on the authority of Thābit al-Ahnaf that he, Thābit, married an *umm al-walad* of the late ʿAbd al-Rahmān b. Zaid b. al-Khaṭṭāb. Then ʿAbd al-Rahmān b. Zaid's son invited Thābit to his house, where he threatened to torture him if he did not divorce the woman. Thābit divorced her one thousand times and departed. On the way back to Mecca, Thābit met ʿAbd Allah b. ʿUmar, who became angry at this story and said that Thābit's divorce was not valid and he should return to his wife. Ibn Zubair, at that time ruler of Mecca, agreed with ʿAbd Allah b. ʿUmar when he heard the story.¹²⁸ Ibn Rāhwayh agrees that divorce under coercion is not valid.

In the eighth category are problems concerned with the condition and status of the husband. Ibn Hanbal says, for example, that divorce pronounced during sleep has no legal effect, nor does silent divorce. Ibn Rāhwayh disagrees about silent divorce, which he considers valid, as long as a man actually intends to divorce his wife. A slave is responsible for his own divorce,¹²⁹ as is a minor youth, if he is mentally mature (according to Ibn Hanbal) and if he shows signs of physical maturity (according to Ibn Rāhwayh). A deaf mute may divorce, Ibn Hanbal says, if he can make himself understood.¹³⁰ The divorce of the delirious or the insane husband is not valid. The divorce of the man in a state of intoxication is a problem for Ibn Hanbal. In AD and IK, he professes himself not satisfied with anything he has heard on the subject and refuses to give a *fatwā*; in AA, he refers to two traditions, one allowing it, the other not, and then says that he follows Shāfiʿi's opinion that the divorce of the intoxicated man is valid;

ʿAbd Allāh says, "My father said, 'Shāfiʿi said, "I find the pen is not lifted for the man who is intoxicated."'" This opinion pleased my father and he followed it." Ibn Rāhwayh attempts to deal with the problem by reference to the precise extent of a man's irrationality due to intoxication.¹³¹

In category nine, discussions of the divorce of the terminally ill man bear out the general principle that a man cannot alter his estate during his terminal illness in a way that affects the shares of his heirs. Therefore, if a husband divorces his wife while ill and then dies, he has divorced her while terminally ill and his divorce becomes invalid.¹³² Within this general framework, Ibn Hanbal and Ibn Rāhwayh consider some additional details and complications. For example, if a healthy man says that his wife will be divorced at a certain time in the future, and he has become ill when that time arrives, and he subsequently dies, his wife inherits from him. But if an ill man divorces his wife, then recovers, and then dies (i.e., of another illness), she does not inherit from him. In the case of a negative oath a husband takes—to divorce his wife if he does not do something—if the husband becomes ill and dies before he does whatever he mentioned, Ibn Hanbal says it is necessary to ascertain what time frame the husband had in mind. Ibn Rāhwayh agrees.

Category ten concerns the question of whether a married female slave's sale automatically results in her divorce. In these texts, this

¹²⁸ AD 92; AA 97, 119; IK 70. Mālik, *Muwattaʿa*, 3:219, and Shāfiʿi, *Umm*, 5:235–236 both say the divorce of the intoxicated man is valid. Shāfiʿi points out that the delirious or insane man is not blameworthy, whereas the intoxicated man is. Therefore, putting all these men in the same category is a false analogy. Also, see Mālik, *Mudawwana*, 3:29–30, for opinions on the authority of various scholars that an intoxicated man's divorce is valid.

For the expression "The pen is not lifted," or rather its normal affirmative form, "The pen is lifted," which means that [at certain times] a person is not held responsible for his acts and therefore will not be judged for them, see Wensinck, *Concordance*, s.v. "*qalam*." Bukhārī, for example, has a tradition in which ʿAlī says, "The pen is lifted from the madman, until he comes to his senses, the minor youth, until he matures, and the sleeping man, until he awakens" (*Ṣaḥīḥ*, 3:405).

¹²⁹ See N. J. Coulson, *Succession in the Muslim Family*, pp. 259–279 for discussion of the legality of various actions a man undertakes during his terminal illness. In considering the validity of divorce during a terminal illness, all illnesses are considered terminal until a man recovers. See, for example IK 246, where Ibn Rāhwayh says, "Whenever divorce is originated while a man is ill, he is considered terminally ill, regardless of whether he recovers." Coulson says, "To ascertain the existence or otherwise of death-sickness is . . . a retrospective process of tracing events back from the time of death to the point of time in the past at which it can be established that the praepositus was a dying person" (p. 262).

¹²⁸ Mālik, *Muwattaʿa*, 3:217.

¹²⁹ See AA 131. A master cannot force a slave of his to divorce against his will. See above, category seven, for divorce under duress, which is not valid for a free man either. See AA 125, 131, and IK 71. See Russell and Suhrwardy, pp. 144–146, for further discussion of what actually constitutes coercion.

¹³⁰ AA 45, 62.

question is considered in conjunction with the story of Barīra, a slave whom ʿĀʾisha manumitted. It is also considered in conjunction with Qurʾān 4:24: *And all married women (are forbidden unto you) save those (captives) whom your right hands possess.* Ibn Hanbal and Ibn Rāḥwayh both agree that if a married female slave is sold, her sale does not result in divorce, and they also agree that verse 4:24 has nothing to do with Barīra.¹³³ In AD 138, Abū Dāwūd asks whether the *ḥadīth* about Barīra is proof that a married female slave's sale does not result in her divorce, and Ibn Hanbal says that it cannot be, because Ibn ʿAbbās related it, and Ibn ʿAbbās held that a married female slave's sale did result in her divorce. Further, Ibn Hanbal says, he does not think that Ibn Masʿūd, who also held that a married female slave's sale resulted in divorce, knew Barīra's story. Therefore, the fact that Ibn Masʿūd interpreted the words *save (those) captives whom your right hand possesses* (4:24) to mean the wives of both unbelievers and Muslims has nothing to do with her. In any case, Ibn Hanbal continues, it is not known whether this verse, which concerns the battle of Autās, was revealed before or after Barīra and her husband parted—another reason it cannot be used to show anything about her. Further, Ibn Hanbal adds (as evidence for his own view) that the Companion Abū Saʿīd al-Khudrī also held that verse 4:24 was revealed with regard to the captives at Autās.¹³⁴ In IK 308, Ibn Rāḥwayh agrees with Ibn Hanbal's opinion both about Barīra and about verse 4:24.

There are many traditions about Barīra. All say that she was bought

¹³³ However, since they deny the connection, they must be responding to other opinions that did connect Barīra's story with verse 4:25. These are not in Mālik or Shāfiʿ.

Mālik says that Barīra was given the option of separating from her husband after ʿĀʾisha manumitted her. See *Muwattaʾ*, 3:180, and *Mudawwana*, 3:30, where Mālik says that Barīra's husband must have been a slave. This is also Ibn Rāḥwayh's opinion (see IK 308). See Shāfiʿi, *Umm*, 5:122, where he agrees with Mālik and Ibn Rāḥwayh that Barīra's husband was a slave, or else she would not have been given the option of separating from him. If Barīra's husband is considered to have been a slave, her case is like that of Zabrah, for which see AD 84.

¹³⁴ Qurʾān 4:24 says . . . *and all married women (are forbidden unto you) save those (captives) whom your right hands possess*; the battle of Autās took place shortly before that of Hunayn. See Guillaume, p. 566. Nāsir al-Dīn al-Baidāwī, *Commentarius in Coranum*, 1:203, explains that Abū Saʿīd al-Khudrī said those at the battle did not wish to have intercourse with the women captured at Autās, as they had husbands. They asked the Prophet's advice, and this verse was revealed. See also Tabarī, 8:153–155.

In IK 304, Kausaj, in summarizing the question of Barīra and the relationship of her case to verse 4:25, adds that some Companions who held that this verse was revealed concerning the women captured at Autās, considered in addition the issue of whether the women were unbelievers or Muslims. He also phrases the issue negatively: Barīra's sale does not show that it did not result in her divorce.

by the Prophet and manumitted by ʿĀʾisha. Otherwise, details vary. For example, either the Prophet or ʿĀʾisha gave her the option of separating from her husband, and Barīra's husband was either free or a slave.¹³⁵ In IK 308, Ibn Rāḥwayh insists that Barīra's husband must have been a slave, because if he were not, her manumission would have made her his equal in status and there would have been no reason for her to be given the option of separating from him.

Divorce by Means of a Zihār Statement

In addition to these categories, other ways of bringing about divorce receive special attention in the Qurʾān, as well as in *fiqh* and *ḥadīth* works.

Zihār is the name given to an oath of divorce that a man swears against his wife in which he compares her to his mother's back. Divorce by *zihār* seems to have been practiced in pre-Islamic Arabia, and unlike the oaths just discussed, it is specifically mentioned in the Qurʾān, where it is both condemned and regulated.¹³⁶ It is condemned in verse 58:2:

*Such of you as put away their wives (by saying they are as their mothers)—they are not their mothers; none are their mothers except those who gave them birth—they indeed utter an ill word and a lie.*¹³⁷

It is regulated in verse 58:3–4:

3. *Those who put away their wives (by saying they are as their mothers) and afterwards would go back on that which they have said, (the penalty) in that case (is) the freeing of a slave before they touch one another . . .*

4. *And he who findeth not (the wherewithal), let him fast for two successive months before they touch one another; and for him who is unable to do so (the penance is) the feeding of sixty needy ones . . .*

The title of Sūra 58, *She That Disputeth*, and the first verse (*Allah hath heard the saying of her that disputeth with thee*), indicate that a specific case inspired the revelation of these verses. According to traditions in both Ibn Hanbal's *Musnad* and Abū Dāwūd's *Sunan*, the woman in this case was Khawla (or Khuwaila) bt. Thaʿlaba, whose husband Aus b. Šāmit

¹³⁵ For a full listing of these traditions, see Wensinck, *Concordance*, s.v. "Barīra."

¹³⁶ See EI, s.v. *Talāq*; Schacht, *Introduction*, p. 165; Wensinck, *Handbook*, s.v. "Divorce"; and Stern, pp. 127–129.

¹³⁷ It is also condemned in verse 33:4, . . . *nor hath He made your wives whom ye declare (to be your mothers) your mothers. . . .*

divorced her by means of *zihār*. When she complained to the Prophet that Aus wished to return to her, the beginning of Sūra 58 was revealed.¹³⁸ Although the details of this case are discussed in tradition literature,¹³⁹ they do not come up at all in these texts, which are concerned with three sets of problems: the women to whom *zihār* is applicable, the effects of certain *zihār* formulas, and questions relating to the expiation of the oath of *zihār*.

Ibn Hanbal says an oath of *zihār* is valid only if taken with regard to a man's wife. Asked whether a man can repudiate a slave by means of *zihār*, Ibn Hanbal says that he can, as long as she is his wife. If she is not a wife but a slave concubine, *zihār* is not applicable to her. The same is true of an *umm al-walad*. 'Abd Allāh ibn Hanbal says, "I asked my father about *zihār*. 'Is it the same in the case of a slave and a free woman?' He said, 'If the slave is the man's wife whom he married for a dower, then *zihār* [is applicable to her]. But if she is his property, or his *umm al-walad*, then she cannot be repudiated by means of *zihār*'" (AA 73). Ibn Rāhwayh agrees with Ibn Hanbal.¹⁴⁰ A woman, Ibn Hanbal and Ibn Rāhwayh say, cannot swear an oath of *zihār*.¹⁴¹ An oath of *zihār* before marriage is valid in that, if the man marries, he must expiate his oath before having intercourse with the woman addressed.¹⁴²

¹³⁸ See Ibn Hanbal, *Musnad*, 6:410–411, and Abū Dāwūd, *Sunan*, 2:218–222.

¹³⁹ See references in Wensinck, *Concordance*, s. v. "*zihāra*."

¹⁴⁰ See IK 114. This view was also that of the Iraqi scholars: Abū Yūsuf reports, on the authority of Ibrāhīm, that the only way a man can separate himself from a female slave is by manumitting her. See #692. See also #697 for the same point of view, on the authority of different scholars. Shāfi'i's view is the same as that of Ibn Hanbal and Ibn Rāhwayh. *Zihār*, he says, is applicable only to women who can be divorced, and they are wives. See *Umm*, 5:277.

Another point of view is found in the *Mudawwana*. There Ibn Qāsim says he thinks that in Mālik's view, a man could repudiate by means of *zihār* a female slave of his, an *umm al-walad*, and a *mudabbara* (a slave whose manumission will take effect upon the death of her master). The reasoning here is that these are women with whom it is lawful for a man to have sexual intercourse, and he can forbid himself sexual intercourse with any one of them by swearing an oath of *zihār* against her. He cannot, however, swear an oath of *zihār* against a partially manumitted slave of his (*mu'taqa illā' al-ajal*), since intercourse with her is already forbidden. See Mālik, *Mudawwana*, 3:51.

¹⁴¹ However, if she does, even though it does not bring about *zihār*, she must expiate it as an oath. In the *Mudawwana*, Ibn Qāsim feels that since in Mālik's doctrine a man can transfer to his wife the right to initiate divorce, he can also transfer to her the right to accept his oath of *zihār*. See Mālik, *Mudawwana*, 3:52–53.

¹⁴² See also Mālik, *Muwatta'*, 3:177. Also see IK 134 and Mālik, *Mudawwana*, 3:55–56, for differences in detail about how many acts of expiation are required, depending upon whether a man marries more than one woman and whether he does so by means of one contract or sequentially.

In discussion of the effects of certain *zihār* formulas, the statement "You are to me like the back of my mother" is the one upon which the other statements considered possible oaths of *zihār* are variants. A decision is required about whether to consider each of these simply as a statement of divorce or specifically as an oath of *zihār*. Divorce that follows an oath of *zihār* is final, whereas other statements that bring about divorce need not be. The statements discussed most often are "You are forbidden to me" and "What God has made lawful to me is forbidden to me." Ibn Hanbal says that these must be treated as *zihār* statements and that they require expiation, unless the husband specifically adds "I mean by this divorce." Ibn Rāhwayh disagrees and says that in every case (except when he adds "I mean by this divorce"), the husband is asked what he intended and the matter is decided accordingly: "Ishāq said, 'He must be asked about his intention. If he intended an oath, then it is an oath. But if he intended a divorce, then it is a divorce. If his intention cannot be ascertained, then what he said most resembles an oath.'"¹⁴³ Another problem with regard to *zihār* statements is whether a statement in which a man compares his wife not to his mother but to any other woman too closely related to him for marriage is also a *zihār* statement. Both Ibn Hanbal and Ibn Rāhwayh think that it is.¹⁴⁴

The expiation required for an oath of *zihār* is described in detail in the Qur'ān. It is most desirable to free a slave; next, to fast two consecutive months, and finally, if wealth and health do not permit either of these, to distribute a *mudd* of wheat to sixty poor people.¹⁴⁵ In these texts, attention is given to issues that might arise about fasting two consecutive months and distributing food to sixty poor people. A man

Shāfi'i, *Umm*, 5:278, says an oath of *zihār* is meaningless before marriage: a man cannot forbid himself something that is forbidden in any case.

¹⁴⁰ Therefore, Ibn Rāhwayh thinks, it should be treated as such; see IK 68.

¹⁴¹ So does Mālik. See *Muwatta'*, 3:178; *Mudawwana*, 3:49–50. Shāfi'i, however, as Rābi'a explains his position, would disagree and exclude women related by fosterage or marriage, since it is possible that at sometime during their lives they might not have been (or may not become, in the case of marriage) too closely related to the prospective oath-taker for marriage, and hence in this essential way they do not resemble his mother, or (for example) a consanguine sister, whom he can never marry. See Shāfi'i, *Umm*, 5:277–278. Echoes of Shāfi'i's views are found in the discussion in the *Mudawwana*.

¹⁴⁵ For expiation of other oaths, see EI, s.v. "*Kaffāra*." Of a *mudd*, Lane says, "a certain measure with which corn is measured; equal to a pint (*rull*) and one-third of the standard of Baghdad, with the people of al-Hijaz and according to Eas-Shāfi'ee; i.e., the quarter of a *ṣā'* which was 5 1/3 pints" (s.v. "*m d d*").

who is fasting must start all over again if he breaks his fast, and he may not have intercourse with his wife until he has completed it. However, if he breaks his fast only a day early, he need not start again; rather he can fast one day to make it up. If sixty poor people are to be fed a *mudd* of wheat, a *mudd* of flour can be substituted. A man should complete his distribution of food before resuming sexual intercourse with his wife; however, if he has intercourse with her before he finishes, he does not start afresh with sixty new people.¹⁴⁰

Both Ibn Hanbal and Ibn Rāhwayh agree that the expiation for the oath of *zihār* need not be carried out if the husband who swore it never wishes to have intercourse with his former wife again. However, even if they are remarried after an intervening marriage of the wife's with another, before a man has intercourse with his wife against whom he swore an oath of *zihār*, he must expiate the oath.¹⁴¹ Finally, if a man has intercourse with his wife before expiating an oath of *zihār*, he performs only one act of expiation.¹⁴² And if he swears an oath of *zihār* against his wife on several different occasions (*fī majālis mulafarriqa*), he performs only one act of expiation. This is the case unless he swears an oath of *zihār*, then expiates it, then swears another oath of *zihār*. In other words, the last thing he does should be the act of expiation.¹⁴³

The Oath of *Īlā'*

The oath of *Īlā'*, a husband swearing to abstain from sexual intercourse with his wife, is mentioned in Qur'ān 2:226–227:

¹⁴⁰Other issues relating to the expiation for *zihār* discussed in both the *Mudawwana* and *Umm* are questions about what kind of slave should be manumitted and technical details about fasting and about the kinds and amount of food distributed. Such details are not mentioned in these texts. See, for example, Mālik, *Mudawwana*, 3:66–83, and Shāfi'i, *Umm*, 5:280–285.

¹⁴¹See *Mudawwana*, 3:65–66, for Mālik's view that expiation is valid only in the case of a man who wishes to have intercourse with a woman when he resumes a marriage in abeyance because of an oath of *zihār* or because he has concluded a new marriage contract with her. He cannot simply perform an act of expiation for an oath of *zihār* with regard to a woman with whom he is forbidden to have intercourse anyway.

Shāfi'i disagrees and says that the consequences of the *zihār* ended with the end of the ownership (*milk*) that the first marriage entailed, and if a couple marry again on the basis of a new contract and a new dowry, no expiation is required from the husband before he has sexual intercourse with his wife. See *Umm*, 5:188. For more details, see *Mudawwana*, 3:57–58.

¹⁴²See, for example, IK 101. See also Mālik, *Muwatta'*, 3:178. Shāfi'i compares this to making up a missed prayer. One makes up the one prayer missed rather than performing more than one because of having missed it (*Umm*, 5:279).

¹⁴³See IK 133. See Mālik, *Muwatta'*, 3:178, for virtually the same wording.

Those who forswear their wives must wait four months; then if they change their minds, lo! Allah is Forgiving, Merciful. And if they decide upon divorce, (let them remember that) Allah is Hearer, Knower.

According to Ibn Hanbal, a man who takes an oath of *Īlā'* swears not to have intercourse with his wife for more than four months. Once four months have passed without intercourse, she can ask him what his intentions are, and at that point, the marriage is suspended. The husband now has the choice of resuming sexual relations with his wife or divorcing her. The marriage is not automatically suspended after four months; the wife must make a formal (i.e., public) request for clarification of her situation; otherwise nothing happens. Once she has made her request, her husband must respond. If, for some reason, he cannot have sexual relations with her, he can declare his intention to resume them as soon as possible. If he divorces her, it counts as a single, revocable divorce.

Although Ibn Hanbal and Ibn Rāhwayh agree on the broad outlines of *Īlā'*, as well as on several details of the length of time and the wording of the oath of *Īlā'*, they disagree on other details. One set of problems is concerned with what constitutes a valid oath of *Īlā'*. Ibn Hanbal says an oath of *Īlā'* must be sworn for more than four months. A man cannot swear to abstain from sexual intercourse with his wife for less than this amount of time and then automatically become a *mūlī* (one who has taken an oath of *Īlā'*) once four months have gone by without his having had intercourse with her.¹⁴⁴ This is not Ibn Rāhwayh's opinion. He says, rather, "Whenever a man swears [not to have intercourse with his wife] for fewer than four months and then leaves his wife (i.e., does not have intercourse with her) for a total of four months, he becomes a *mūlī*."¹⁴⁵ A slave, Ibn Hanbal says, takes an oath of *Īlā'* for the same amount of time as a free man, four months. Ibn Rāhwayh says his oath of *Īlā'* is for only two months, "because everything he does in the field of divorce . . . is one-half."¹⁴⁶ An oath of *Īlā'* qualified by reference to a particular place does not, according to Ibn

¹⁴⁴Mālik and Shāfi'i both say that if a man swears not to have sexual intercourse with his wife for fewer than four months, by the time four months have passed, the terms of an oath of *Īlā'* are no longer applicable. See Mālik, *Muwatta'*, 3:175–176, and Shāfi'i, *Umm*, 5:265.

¹⁴⁵See IK 103. Note also, though, that in IK 34, Ibn Hanbal and Ibn Rāhwayh agree that if a man marries and does not have intercourse with his wife for four months, the couple are separated.

¹⁴⁶See AA 156 and IK 53. Ibn Hanbal notes (in AA 156) that Zuhri said the slave's oath of *Īlā'* was four months. Mālik too notes Zuhri's opinion, but agrees with Ibn Rāhwayh that the oath of *Īlā'* of the slave is two months (*Muwatta'*, 3:176).

Hanbal, really constitute an oath of *ilāʾ*, because if a man swears he will not have intercourse with his wife in a certain dwelling, for example, he can have intercourse with her elsewhere. Ibn Rāhwayh disagrees and says it is still an oath of *ilāʾ*, because it is an oath not to have intercourse.¹⁵³

They both agree, however, that saying, "God willing" in an oath of *ilāʾ* is permitted, that an oath of *ilāʾ* before marriage has no legal consequences,¹⁵⁴ and that the four months that must elapse after a man swears an oath of *ilāʾ* and before the marriage can be suspended must be consecutive months. On this last, if a man divorces his wife singly two months after he has sworn an oath of *ilāʾ* and then remarries her, he cannot continue the period of *ilāʾ* for two more months. If a man claims he has interrupted the four months by having intercourse with his wife, he is believed.¹⁵⁵ Conversion (e.g., a Christian becoming a Muslim after he has sworn an oath of *ilāʾ*) is not considered an interruption. Finally, Ibn Hanbal says that it is irrelevant to an oath of *ilāʾ* whether a man swears it out of vexation or contentment.¹⁵⁶

Other questions address the status of the marriage after the period of *ilāʾ*. Both Ibn Hanbal and Ibn Rāhwayh say that when four months have passed after a man has taken an oath of *ilāʾ*, either nothing happens or the wife can ask for a resolution of the question. At that point, the marriage is suspended. Divorce does not automatically take place after an oath of *ilāʾ*, either at the end of four months or at the end of a year, if a man has sworn not to have intercourse with his wife for that long.¹⁵⁷ Further, both Ibn Hanbal and Ibn Rāhwayh say that at the end of the four-month period following an oath of *ilāʾ* if a husband does in fact divorce his wife, the divorce is a single, nonfinal divorce.

¹⁵³ See IK 274. Shāfiʿi, *Umm*, 7:158, agrees with Ibn Hanbal; Ibn Rāhwayh's view is upheld by Ibn Qasim in Mālik's *Mudawwana*, 3:87–88.

¹⁵⁴ See IK 274. Ibn Hanbal says divorce is not a necessary component of an oath of *ilāʾ* and therefore *istihṭāʾ* is permitted in one. Mālik agrees with Ibn Hanbal and Ibn Rāhwayh; see *Mudawwana*, 3:85–86. Shāfiʿi disagrees and says an oath of *ilāʾ* that includes the words "God willing" is not an oath of *ilāʾ*. See *Umm*, 5:268.

¹⁵⁵ He is also believed if he claims he has had intercourse with her after the four months are up, because it is lawful for him to have intercourse with his wife at both points in time. See IK 273.

¹⁵⁶ See also Shāfiʿi, *Umm*, 5:268.

¹⁵⁷ Mālik and Shāfiʿi agree with Ibn Hanbal and Ibn Rāhwayh about this and refer to the opinions of earlier scholars with which they all four disagree. For example, some held that the result of an oath of *ilāʾ* was a nonfinal divorce. Mālik attributes this view to Saʿd b. al-Musayyab and Abū Bakr b. ʿAbd al-Rahmān. Others held that it was a definite divorce. Shāfiʿi attributes this view to Ibn Abī Lailā. See Mālik, *Muwattaʾ*, 3:173–174, and Shāfiʿi, *Umm*, 7:158.

Oaths of *zihār* and *ilāʾ* are discussed together, usually in terms of resolving a marital situation in which the marriage is neither on nor off. In AD 107, Abū Dāwūd asks Ibn Hanbal whether a marriage is suspended when a man repudiates his wife by means of *zihār*, and Ibn Hanbal says it is not, because *zihār* is not *ilāʾ*. Abū Dāwūd says that that means the husband who swears an oath of *zihār* hinders his wife from remarrying, and Ibn Hanbal says he must not do that. The point here is that neither oath automatically results in divorce,¹⁵⁸ and turning *zihār* into *ilāʾ* is a way of allowing the wife to press for clarification of her situation.¹⁵⁹

In IK 139, in response to questions from al-Kausaj, Ibn Hanbal describes how a situation is resolved in which a husband has taken an oath of *ilāʾ* and followed it by an oath of *zihār* to which he has added a period of time—"You are to me like the back of my mother, if I have intercourse with you during the coming year." In this case, Ibn Hanbal says the wife can ask to be separated from her husband if he does not resume sexual relations with her after four months. If he does wish to resume sexual relations with her, he must first expiate his oath of *zihār*. Ibn Rāhwayh agrees with Ibn Hanbal.

Liʾān

If a man wishes to deny paternity of the child with whom his wife is pregnant, he can choose to obtain a divorce by instituting the procedure of *liʾān*. To do this, he publicly accuses his wife of adultery. He must do so in front of a judge four times and then repeat his accusation a fifth time after invoking the curse of God upon himself if he is lying about her.¹⁶⁰ If at any point he admits he is lying, he receives the *ḥadd* punishment for false accusation of adultery, or slander, which is

¹⁵⁸ This is different from the fact that when divorce follows an oath of *zihār*, it is triple and final, and when it follows an oath of *ilāʾ* it is single and revocable.

¹⁵⁹ Mālik specifically says *zihār* turns into *ilāʾ* if a man means to be harmful to his wife: if his harmful intention is known, after four months have passed, his marriage is suspended, and he is given the choice of expiating his oath of *zihār* or divorcing his wife (Mālik, *Mudawwana*, 3:60–63). See also Shāfiʿi, *Umm*, 5:280.

¹⁶⁰ *Liʾān* is described in the Qurʾān 24:6–9. See AA 157 and IK 115 for a description of the procedure to be followed. Also see *El*, s.v. "Talāq," for a description of the procedure to be followed. It is recommended that Muslims swear in mosques, Jews and Christians in their own houses of worship. See this same article for Schacht's description of the historical evolution of the kinds of questions that developed concerning the effects of *liʾān*.

In these texts, it is assumed that if the wife is proven guilty, the *liʾān* procedure itself results in divorce.

eighty lashes.¹⁶¹ A wife responds to her husband's accusation by participating in the *li'an* procedure. If she is innocent, she swears that she is so, four times. She swears again a fifth time, after being warned of the punishment of Hell, and reaffirms her innocence after invoking the curse of God upon herself if she is lying. If she confesses, she receives the *hadd* punishment for adultery, and responsibility for the child is hers alone.¹⁶² If the husband does not follow through on his accusation, or the wife maintains her innocence, the marriage is not terminated, and the husband is punished for slandering his wife. Once a couple have been separated by *li'an*, they can never remarry.

If there is no child involved, and a man accuses his wife of adultery, he receives the *hadd* punishment for slander.¹⁶³ He also receives this punishment if he accuses a wife from whom he is triply, or definitely divorced, since in this case he is slandering a stranger, whether he does it during her *'idda* or after it has ended. Thus once he is finally divorced from a woman, a man cannot deny the paternity of a child she bears during her *'idda*.¹⁶⁴

¹⁶¹ *Hadd* punishments are those specified in the Qur'an. For slander, see verse 24:4. *Kadhif* is an accusation of unlawful intercourse, either fornication or adultery. Such an accusation may or may not turn out to be false. See *El*, s.v. "*Kadhif*" and s.v. "*Zinā*."

¹⁶² See Qur'an 24:2 and *El*, s.v. "*Zinā*." The punishment depends upon whether the guilty party has the quality of *ihṣān*. For this term, see also n. 166 below and IK 99. See IK 115 for discussion of a wife who neither confesses her guilt nor fully affirms her innocence.

¹⁶³ It is taken for granted that he will not provide the rigorous eyewitness proof required to make his accusation stick. See Qur'an 24:11–19 for this proof. These verses were revealed to Muhammad after 'Ā'isha was accused of adultery. For this incident, see *El*, s.v. "'Ā'isha"; Guillaume, pp. 493–499; Abbott, 'Ā'isha, pp. 29–38; and references in these to relevant traditions. When the Muslim forces were returning to Madina after the raid against the Banū Muṣṭaliq in 6/628, 'Ā'isha was left behind and then brought home later by a young man who had found her alone in the desert.

In IK 268, a man accuses his wife of adultery and names another as the one who fornicated with her. In this case, if the other man asserts his innocence and the wife swears hers in *li'an* proceedings, no one is punished. In IK 275, a man who had been presumed dead returns to find his wife remarried and divorces her by means of *li'an*, presumably to deny paternity of a child she might bear. In this case, she and her second husband are free to remarry, after she has waited an appropriate *'idda*.

¹⁶⁴ On this last point, Mālik and Shāfi'i both differ. In the *Muwatta'*, Mālik says a man can slander a woman from whom he is triply divorced and then move on to institute *li'an* proceedings, in order to deny paternity of a child of hers. Shāfi'i agrees and says that although the couple have become like strangers as a result of their triple divorce, any child the wife bears who might belong to the husband harks back to their marriage. See Mālik, *Muwatta'*, 3:191–92; Shāfi'i, *Umm*, 5:288.

If a woman has had intercourse with two men (e.g., a free woman in successive marriages, a slave concubine with successive owners) and she delivers a child, the time

A number of responses take up the issue of the religious and legal status of the spouses involved in *li'an*. It turns out that the husband can be free or a slave, as can the wife, who can also be Christian or Jewish.¹⁶⁵ The point Ibn Hanbal and Ibn Rāhwayh make obliquely is that since the purpose of *li'an* is to deny paternity, it does not matter whether the spouses have the quality of *ihṣān*, or moral respectability. A person who has this quality is *muḥṣan* (fem. *muḥṣana*). A free person becomes *muḥṣan* by consummating a valid marriage with a free spouse.¹⁶⁶ Ibn Hanbal and Ibn Rāhwayh agree that marriage with a slave does not make a free Muslim (man or woman) *muḥṣan*.¹⁶⁷

Both Ibn Hanbal and Ibn Rāhwayh assume that a wife who is deaf and dumb would not have the capacity to defend herself against an accusation of adultery by participating in a *li'an* procedure, and they therefore agree that her husband cannot divorce her this way.¹⁶⁸

Sometimes a husband makes a statement not considered serious enough to call for further action by either him or his wife. If, for example, he sees her with a child and says, "This child is not yours," his statement has no legal effect.¹⁶⁹ On the other hand, if he sees his wife nursing a child and says, "This is not my child, but I am not hereby slandering my wife," Ibn Hanbal and Ibn Rāhwayh think, nonetheless, that *li'an* proceedings should be instituted.¹⁷⁰

limit within which the child will be the first man's responsibility is six months. If a woman has been divorced and not remarried, she can claim that her former husband is the father of any child she delivers within a four-year period.

¹⁶⁵ See Qur'an 4:24–25 and 5:5 for women whom the believers should marry.

¹⁶⁶ See Schacht, *Introduction*, p. 125, for this definition. Schacht also mentions the other meaning of the term: a free Muslim who has never committed unlawful intercourse and therefore can only be falsely accused of doing so. That is, his accuser would incur the penalty for slander. For the development of Qur'anic exegesis and traditions about the meaning of *ihṣān*, see John Burton, "The Meaning of 'Iḥṣān.'" In these responses, *ihṣān* means someone liable to the penalty of stoning for fornication or adultery. Ibn Hanbal and Ibn Rāhwayh discuss the meaning of the term in IK 99.

¹⁶⁷ See again IK 99. Mālik disagrees and says that it does. At issue is the punishment a person receives once he (or she) has been proved guilty of adultery or fornication. A person who is *muḥṣan* is stoned. A slave is flogged. Mālik's opinion is that a free Muslim is made *muḥṣan* by consummation of any valid marriage and that marriage with a slave is valid. See *Muwatta'*, 3:151–152. See Burton, *Sources*, pp. 136–142, for a discussion of Shāfi'i's views regarding the definition of *muḥṣan*.

¹⁶⁸ Shāfi'i leaves room for such a wife's ability to make herself understood. If she can, her husband is free to use the procedure of *li'an* against her. See *Umm*, 5:286–287.

¹⁶⁹ See IK 266. See also Shāfi'i, *Umm*, 5:293–296.

¹⁷⁰ See again IK 267. This would enable the wife to establish her innocence, and if she did so, lead to a *hadd* punishment for false accusation by the husband. Note that Sufyān b. 'Uyayna would let the matter hang. See Shāfi'i, *Umm*, 5:287–289, for circumstances in which a husband's accusation against his wife simply lapses.

Takhyir

There are two statements a man can make to transfer the right of divorce to his wife. He can say to her either "Choose!" (*ikhtārī*), or "Your matter is in your hands" (*amruki biyadihi*). The first is usually referred to as *takhyir*, giving a choice or option; the second as *tamlik*, delegation or transfer of power—in this case the power of the option to initiate divorce.

One of the points always made about *takhyir* is that the wife must take up her opportunity to choose right then and there, during the conversation with her husband in which she is offered it. Another point, one on which there is some disagreement, is whether the offer of the choice in and of itself counts as a divorce, so that if the wife chooses her husband, they remain married in a marriage that has a single divorce behind it. Both of these points, and indeed *takhyir* in general, are associated with Qurʾān 33:28–29, the "verse of the choice," and with the story told by ʿĀʾisha about the Prophet reciting it to her. In a version of this story in Ibn Hanbal's *Musnad*, ʿĀʾisha says:

The Prophet came to me and said, "I have something to put to you, but you must not hurry to make a decision about it before you consult your parents." I said, "What is it?" and he recited to me: *O Prophet! Say unto thy wives: If ye desire the world's life and its adornment, come! I will content you and will release you with a fair release. But if ye desire Allah and His messenger and the abode of the Hereafter, then lo! Allah hath prepared for the good among you an immense reward.* Then ʿĀʾisha said, "I said, 'What is there here for you to order me to consult my parents about? Indeed, I desire God and His messenger and the abode of the Hereafter.'" ¹⁷¹

ʿĀʾisha continues by relating the Prophet's pleasure at her response and that of his other wives, who, upon learning of ʿĀʾisha's choice, also chose to remain with the Prophet. In this version of the story, and in all others, ʿĀʾisha immediately chooses to remain with the Prophet, but the end of the story is not always the same. Here, after explaining how the Prophet's other wives also chose to remain with him, she says that they did not consider the choice and their rejection of it a divorce: "We chose the Messenger of Allah and we did not consider that a divorce." However, there are other traditions in which ʿĀʾisha is

¹⁷¹ Ibn Hanbal, *Musnad*, 6:185. For more of the details of events in the Prophet's household surrounding the revelation of the "verse of the choice," see Abbott, ʿĀʾisha, pp. 51–56.

reported to have said, instead, "The messenger of Allah gave us the choice, and then we chose him, and that was a divorce."¹⁷² These texts reflect both possibilities: in AA 114, Ibn Hanbal says that if a wife chooses to remain with her husband, no divorce has taken place, whereas in IK 83 he says that if she chooses to remain with her husband, a single divorce has taken place.¹⁷³

Another issue discussed in connection with *takhyir* is how many divorces the wife can effect. Ibn Hanbal—like Shāfiʿī but not Mālik—says that if she chooses herself, that counts as a single revocable divorce; Ibn Rāhwayh agrees.¹⁷⁴

If a man puts his wife's matter into her hands, she can divorce herself from him singly, doubly, or triply, unless he has specified a number. Unlike *takhyir*, which is over as soon as the couple's conversation ends, *tamlik* gives a wife the option of divorcing her husband any time before they again have sexual intercourse or until he retracts his statement.¹⁷⁵

If a female slave married to a slave husband is manumitted, her matter is considered to be in her hands, and she has the option of divorcing herself from him as long as he has not had intercourse with her. The story most often used to illustrate this is that of Zabrah, who was manumitted by the Prophet and then informed of her right to divorce her husband by the Prophet's wife, Hafsa.

Ibn Rāhwayh makes a case for assimilating *takhyir* and *tamlik* by his insistence that all divorce formulae are to be understood in accordance with the husband's intentions. Thus, whether they differ from each other or are exactly alike with regard to how long the wife has the power to divorce herself and to how many divorces she can effect depends entirely on the husband's intentions, which are to be ascertained by having him take an oath.

¹⁷² Shāfiʿī reports, with two different *isnads*, that the whole incident of the choice resulted in a single divorce. He also reports that this was ʿAlī's opinion. Ibn Rāhwayh has a tradition to this effect in his *Musnad* (Shāfiʿī, *Umm*, 5:140 and 7:172; Ibn Rāhwayh, *Musnad*, #833). For traditions about *takhyir*, see Wensinck, *Concordance*, s.v. "*khayyara*" and "*ṣiratu'l-ahzāb*," for references to commentary on Qurʾān 33:28–29.

¹⁷³ See Schacht, *Origins*, p. 215, where he attributes the second doctrine to formalistic reasoning on the part of some Iraqi jurists.

¹⁷⁴ See, for example, IK 315. Mālik, however, says that it counts as a triple divorce, unless the husband specifies that he is giving her the choice of divorcing herself only singly. Mālik, *Mudawwana*, 2:373. See Shāfiʿī, *Umm*, 5:139, for an argument against Mālik's position.

¹⁷⁵ *Takhyir* is also ended by an act of intercourse. See, for example, AD 86. In IK 213, Sufyān b. ʿUyayna and Ibn Rāhwayh make the point that *takhyir* is ended by an act of intercourse only if the wife knew of her option; Ibn Hanbal says regardless of whether she knew of it.

*Khul'*¹⁷⁶

A marriage is ended by *khul'* when a woman initiates divorce by offering to buy her freedom from her husband or to ransom herself. Although it is not specifically mentioned in the Qur'ān, 2:229–230 are taken by early jurists to refer to it:

Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allāh. And if ye fear that they may not be able to keep the limits of Allāh, in that case it is no sin for either of them if the woman ransom herself. These are the limits (imposed by) Allāh. Transgress them not. For whoso transgresseth Allāh's limits: such are wrongdoers. And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband (2:229–230).¹⁷⁷

The most widely cited example of this kind of divorce is that of the wife of the Companion Thābit b. Qais b. Shammās, whose name is most often given as Ḥabība bt. Sahl. Ḥabība went to the Prophet to say that she and Thābit were incompatible, and the Prophet ordered her to compensate Thābit in return for the dissolution of their marriage. In the version of the story in AA 56, the Prophet orders her to return to Thābit the garden he had given her.¹⁷⁸

One issue involved in discussion of the details of *khul'* was whether it led to the dissolution of the marriage by annulment (*faskh*) or by divorce (*talāq*). An annulment would not count as one of the three divorces a couple are allowed before they are irrevocably divorced and cannot remarry unless the wife has been married to another husband. Ibn Hanbal and Ibn Rāhwayh both agree that *khul'* results in

¹⁷⁶On the word *khul'*, see Lane, s.v. "kh F," for the root meaning of "to pull off, or strip or cast off (a garment)." The form 3 verb can be used for this kind of divorce; if used of the wife, it means "she incited, urged, or induced her husband to divorce her for a gift, or a compensation." If used of the husband, it means "he divorced his wife for a ransom given by her . . . or for a gift or a compensation." Form 1 can also be used. The form 8 active participle, *muḥtāl'a*, is used of the wife who has initiated a *khul'* divorce.

See EI, s.v. "Talāq," for Schacht's summary history of *khul'*. See W. Robertson-Smith, *Kinship and Marriage in Early Arabia*, pp. 112–113, for *khul'* in pre-Islamic Arabia.

¹⁷⁷The word for "ransom" in this verse is *iftadā* (root, *f d y*). This verse is also quoted in AA 57.

¹⁷⁸See also IK 80 for this story. See Stern, pp. 129–132, for stories of two other cases of *khul'*. IK 80 opens the possibility of modifying Schacht's statement (EI, "Talāq") that the details of the story of Thābit and his wife are not utilized in *fiqh*.

dissolution of the marriage by annulment, an opinion attributed to Ibn 'Abbās. To explain it, Ibn Hanbal relates Ibn 'Abbās's interpretation of verse 2:229: "Ibn 'Abbās said, 'Allah mentioned divorce in the beginning, ransoming in the middle, and divorce after that.' He holds that *khul'* is not divorce, but rather ransoming."¹⁷⁹ 'Uthmān's name is associated with the opinion that *khul'* results in divorce rather than annulment, a view that Ibn Hanbal specifically rejects in AA 57 by questioning the *isnād* of a *ḥadīth* reporting it.¹⁸⁰ Whether it is regarded as an annulment or a divorce, the legal effects are those of a definite, or triple divorce. For example, a woman who has parted from her husband by *khul'* waits the same *idda* as a divorcee.¹⁸¹ Also, if her husband divorces her during her *idda*, it has no effect, and the couple cannot remarry without a new contract and a new dower.¹⁸²

Another issue was what the woman actually gave her husband. In one version of the story of Thābit b. Qais and Ḥabība bt. Sahl (related by Ibn Hanbal in AA 56), Ḥabība returned to Thābit his garden. In another, she returned to him whatever he had given her.¹⁸³ In both versions, the implication is that she returned exactly what she had received as a dower. The question then arose, whether the husband could take from his wife more than he had given her as a dower, or less. Ibn Hanbal disapproves of a husband's taking back more than he originally gave his wife; he says, for example, "I do not like him to do that" and "He should not take from her more than he gave her." And Ibn Rāhwayh, at one point, says it is not lawful for a husband to take from his wife more than he gave her.¹⁸⁴ Under certain conditions, separation by *khul'* can also take place for no compensation. Ibn Hanbal makes this point in AA 162, and Ibn Rāhwayh elaborates on it in

¹⁷⁹AA 57.

¹⁸⁰See again AA 57. Mālik and Shāfi'i both hold that *khul'* is divorce. See Mālik, *Mudawwana*, 2:335, and Shāfi'i, *Umm*, 5:197.

¹⁸¹But see IK 80.

¹⁸²See AA 53. Ibn Hanbal says that if a couple remarry after parting by *khul'*, their marriage has two divorces behind it. He seems here to follow verse 2:229, by assuming that a couple would not part by means of *khul'*, unless they had already been divorced twice.

¹⁸³See, for example, Mālik, *Muwatta'*, 3:185; Shāfi'i, *Umm*, 5:197.

¹⁸⁴AD 132, IK 355, IK 357. In IK 355, Ibn Rāhwayh agrees with Ibn Hanbal that a man "should not take back more than he gave his wife." In IK 357, he says it is not lawful to do so. However, neither says that *khul'* is thereby invalid.

Mālik and Shāfi'i do not agree with them. In the *Muwatta'*, Mālik says, "There is no harm in a woman ransoming herself from her husband for more than he gave her," and Shāfi'i, referring to 2:229, says, "There is no specification in the [word] ransom as to whether it be more or less than he gave her" (Mālik, *Muwatta'*, 3:185). See also *Mudawwana*, 2:335, 340–341; Shāfi'i, *Umm*, 5:197.

IK 357, where he discusses *khul'* in terms of the failure of two arbiters to reconcile a couple.¹⁸⁵

If a woman has parted from her husband by means of a *khul'* divorce during his terminal illness, Ibn Hanbal does not think that she inherits from him. Shāfi'i shares Ibn Hanbal's view; Mālik does not.¹⁸⁶ Ibn Rāhwayh does not comment on this particular problem.

ʿIdda

A woman's *ʿidda* is the period of time she must wait before she can remarry after she has been divorced or widowed. The Qurʾān regulates the *ʿidda* in some detail; here, on the basis of these regulations, Ibn Hanbal and Ibn Rāhwayh are asked a number of questions of further detail. To consider first the divorcee, The Qurʾān mentions her *ʿidda* in 2:228: *Women who are divorced shall wait keeping themselves apart, three (monthly) courses; . . .* Questions arose about the meaning of the word for "courses," *qurūʾ* (or *agrāʾ*, singular *qurʾ*), which can be understood as either menstrual periods or the interval between two menstrual periods.¹⁸⁷ In AD, asked about the meaning of this word, Ibn Hanbal hesitates between the traditions on the authority of ʿAlī and Ibn Masʿūd that it means menstrual periods and the traditions on the authority of ʿĀʾisha that it means the time between. In AA, he mentions the disagreement (*ikhtilāf*) on this term and then relates that a tradition on the authority of ʿĀʾisha says a *qurʾ* is the time between two menstrual periods. The issue is not mentioned in IK. Whatever the word means, the length of time a divorcee's *ʿidda* lasts is meant to be calculated in terms of menstrual periods. If she is too old or too young to menstruate, her *ʿidda* is an equivalent three months: *And for such of your women as despair of menstruation . . . their period (of waiting) shall be three months, along with those who have it not (65:4).*

Another question is what a woman is to do who is waiting an *ʿidda*

¹⁸⁵ In the *Mudawwana*, also in a discussion of reconciling a couple, Ibn Qāsim points out that where the wife seeks a separation from her husband because she fears his behavior, he should divorce her for no compensation at all. In this case, the element in the separation that makes it separation by *khul'* is that the wife initiated it. See Mālik, *Mudawwana*, 2:235. See in addition, Mālik, *Muwattaʾ al-Shaibānī*, p. 230, where Shaibānī reports that this is also Abū Hanīfa's opinion. See both these references for separation by *khul'* in which a husband takes everything his wife has. Although reprehensible, such extreme compensation does not invalidate the *khul'*.

¹⁸⁶ See AD 149, Shāfi'i, *Umm*, 5:200; Mālik, *Mudawwana*, 2:351. See Coulson, p. 277: only the Mālikis have a woman inherit from her late former husband in this case.

¹⁸⁷ This has some practical consequences for calculating how long a woman's *ʿidda* is to last; see EI, s.v. "*ʿidda*."

calculated in terms of months but then starts to menstruate within the three-month period. The answer is that she begins her *ʿidda* over again and waits it in terms of menstrual periods. If the opposite occurs—a woman is waiting her *ʿidda* in terms of menstruation and then stops menstruating, there are two ways for her to complete her *ʿidda*. If she knows why she has stopped menstruating (for example, because she is nursing or because she is ill), she waits until she starts menstruating again, then completes a new *ʿidda* in terms of menstrual periods. If she does not know why she stopped, her *ʿidda* lasts a year—nine months to cover the eventuality of pregnancy and three months in place of the three menstrual periods.¹⁸⁸

Women divorced before their husbands have had intercourse with them need not wait an *ʿidda* in accordance with verse 33:49: *O ye who believe! If ye wed believing women and divorce them before ye have touched them, then there is no period that ye should reckon. . . .* This situation is referred to only once, in IK 189, in connection with the question of whether a man who wishes to divorce his wife before having intercourse with her should do so while she is menstruating.

The *ʿidda* of slave women who have been divorced is two menstrual periods, or two months. This accords with the general tendency to halve legal effects for slaves.¹⁸⁹ There was some thought that if she did not menstruate, a slave divorcee should wait an *ʿidda* of one and one-half months. Ibn Hanbal does not support this view; neither does Ibn Rāhwayh.¹⁹⁰

The Qurʾān mentions the *ʿidda* of a widow in 2:234: *Such of you as die and leave behind them wives, they (the wives) shall wait keeping themselves apart, four months and ten days. . . .* As with the *ʿidda* of the slave divorcee, the question arose of the length of the *ʿidda* of the slave widow. Ibn Hanbal notes that Muḥammad b. Sirīn and Makhūl both said she

¹⁸⁸ See AD 169 and 170 for discussion of the shortest time in which a woman can be expected to have had three menstrual periods. See AD 173, AD 174, and IK 56 for the longest time a woman might be pregnant.

¹⁸⁹ See Qurʾān 4:25, where the punishment for adultery committed by slave wives is half that of free wives. See Burton, *Sources*, pp. 127–145.

¹⁹⁰ Ibn Hanbal attributes to ʿAlī the opinion that a divorced female slave waits an *ʿidda* of one and one-half months. First, he quotes ʿUmar as saying, "If I were able to make the female slave's *ʿidda* one and one-half menstrual periods, I would." Then Ibn Hanbal goes on, "It is related on the authority of ʿAlī that he said she waits an *ʿidda* of two menstrual periods, and one and one-half months if she does not menstruate. This is what he would always say: 'I do not judge until I know what the Prophet said about a given matter.'" ʿAbd Allāh b. Hanbal concludes this response by saying, "My father said, 'But I follow ʿUmar's doctrine: that if she does not menstruate, then two months, and if she does, then two menstrual periods.'"

waited an 'idda of four months and ten days. "They followed," he says, "the literal sense of the verse." He himself does not agree and says the majority hold that the length of her 'idda is comparable to that of the slave divorcée and, therefore, half of that of the free widow: "Mostly we have heard that she waits half the 'idda of the free woman—two months and five days, because they have compared it to divorce, so made incumbent upon her, half the 'idda of the free woman. This is found on the authority of the Prophet." Ibn Rāhwayh agrees.¹⁹¹

The Qur'ān says that the 'idda of a pregnant woman ends with her delivery: *And for those with child, their period shall be till they bring forth their burden* (65:4). This verse is usually taken to refer to both divorcées and widows, and Ibn Hanbal says specifically that a widow's 'idda ends with her delivery.¹⁹² However, some held that the widow's 'idda had to be a minimum of four months and ten days, and therefore if she gave birth before that much time had elapsed, she had to wait out her full widow's 'idda.¹⁹³

The length of the 'idda of an *umm al-walad* occasioned much discussion. An *umm al-walad* is a female slave who has borne her master children. If he has recognized the children as his own, he cannot sell her. He may either keep or manumit her during his lifetime, but she is automatically free upon his death. The length of her 'idda upon his death depends upon whether she is thought of as a slave or a free woman.¹⁹⁴ Both views were held. If she was considered a slave, her 'idda was said to be a month (i.e., an *istibrā'*).¹⁹⁵ If her change in status from a slave to a free woman was emphasized, her 'idda was said to be four months and ten days. In addition, there was a view that her 'idda should be three months. In these texts Ibn Hanbal, at one point or another, upholds all three of these opinions. In AA 135, he says her 'idda is one menstrual period, "because she is a slave with respect to

all her circumstances,"¹⁹⁶ and he reasons against the other two choices. He reasons against her waiting an 'idda of four months and ten days by quoting verse 2:234 and then saying, "The *umm al-walad* is neither free nor a wife that she should wait four months and ten days." He reasons against her waiting an 'idda of three menstrual periods by saying, "[T]his is a doctrine without an argument [to support it], rather the divorcee waits an 'idda of three menstrual periods, and this woman is neither a divorcee nor free."¹⁹⁷ However, in IK 361 he says her 'idda is four months and ten days, and in IK 149 he says that the 'idda of an *umm al-walad* who does not menstruate is three months, because "that is the least time within which pregnancy becomes apparent."¹⁹⁸

A woman whose husband has been declared a missing person (*mafqud*) waits a widow's 'idda on his behalf and is then free to remarry.¹⁹⁹ A man is considered a *mafqud* if he has been absent for four years²⁰⁰ and it is reasonable to assume that he has died, either in battle or at sea, or simply because his absence is inexplicable.²⁰¹ Some held that in addition to waiting a widow's 'idda, the wife of a *mafqud* should be formally divorced from her husband and also wait a divorcée's 'idda. This view is contained in a story Ibn Hanbal relates in AA 78 about a woman who went to the Caliph 'Umar b. 'Abd al-'Azīz to tell him her husband was missing. After four years, 'Umar instructed her to wait an 'idda of four months and ten days. Once she had done so, he instructed the husband's next of kin to divorce her on her hus-

¹⁹⁶ Thus he equates her 'idda with the *istibrā'* of a female slave who cannot become her new owner's concubine for one month after she has been sold to him. See below, n. 205, for a discussion of the *istibrā'* for female slaves.

In AD 166, Ibn Hanbal mentions that Ibn 'Umar said an *umm al-walad*'s 'idda was one month but that he himself avoids saying anything about this issue.

¹⁹⁷ In AA 135, to describe her status more precisely, Ibn Hanbal says, "The *umm al-walad* is a slave who is emerging from slavery to freedom."

¹⁹⁸ Malik says her 'idda is one month if she menstruates, and if she does not, it is three months to ascertain whether she is pregnant. Shāfi'i's opinion is that the 'idda of the *umm al-walad* is an *istibrā'*, and hence it is one month. See Malik, *Muwatta'*, 3:223, and Shāfi'i, *Umm*, 5:218.

¹⁹⁹ At this point, according to Ibn Hanbal, his estate is also distributed, but see AD 127, where Abū Dāwūd asks Ibn Hanbal about Malik's doctrine that the inheritance of the *mafqud* is distributed only after eighty years have passed. Ibn Hanbal rejects this doctrine.

²⁰⁰ This length of time was fixed by administrative decree in Umayyad times. See Schacht, *Origins*, p. 211.

²⁰¹ In AD 115, 116, and 117, Ibn Hanbal insists that a man whose absence is easily explained is not a *mafqud*.

¹⁹¹ See AA 154 and IK 39.

¹⁹² For a special case, see IK 323.

¹⁹³ This point of view is attributed to Ibn 'Abbās. See Schacht, *Origins*, p. 225, where he mentions this view as part of a tendency toward greater strictness. Ibn 'Abbās's opinion did not prevail, and Ibn Hanbal and Ibn Rāhwayh do not mention it in these texts. Malik and Shāfi'i both mention this opinion on the authority of Ibn 'Abbās, but they do not follow it either. See Malik, *Muwatta'*, 3:219–221, and Shāfi'i, *Umm*, 5:223–224. All the major *hadith* collections also mention Ibn 'Abbās's opinion. But wherever the compilers themselves express an opinion, it is always in favor of the pregnant widow remarrying as soon as she has delivered. See Wensinck, *Handbook*, s.v., "Ida."

¹⁹⁴ For the history of the development of doctrine regarding the *umm al-walad*, see EI, s.v., "Umm al-walad." See also Schacht, *Origins*, pp. 264–265.

¹⁹⁵ See below, n. 205, for the meaning of *istibrā'*.

band's behalf, and then, after she had waited the *'idda* of a divorcee, she was free to remarry. Ibn Hanbal does not agree with this view; he holds that the wife of a *mafqud* can remarry after waiting a widow's *'idda*. A slave woman married to a *mafqud* waits for only two years for him to return, and possibly waits an *'idda* of only two months and five days. Abū Dāwūd is not sure whether he actually heard this last from Ibn Hanbal.²⁰² If the *mafqud* shows up after his wife has been remarried and his inheritance divided up, both Ibn Hanbal and Ibn Rāhwayh hold that he recovers what he can of his property.²⁰³ If, Ibn Hanbal says, his wife has remarried, he may choose between insisting that his wife divorce her current husband and, after an appropriate *'idda*, remarry him, or accepting instead a return of the dower he originally gave her.²⁰⁴

An *istibrā'* is the amount of time a female slave waits after a change of owner before her new owner is permitted to have intercourse with her.²⁰⁵ If she menstruates, Ibn Hanbal says her *istibrā'* lasts one month; if not, three months, because that is the least time in which pregnancy is established. Generally, her new owner, the buyer, is considered responsible for his female slave's *istibrā'*, although both Ibn Hanbal and Ibn Rāhwayh indicate that the seller, in some circumstances, might also benefit from having her wait an *istibrā'*. In IK, two instances are mentioned of a man wishing not to sell but to give in marriage a female slave of his. In one case, she is an *umm al-walad*, and he should definitely have her wait an *istibrā'* before giving her in marriage; in the other, she is a slave with whom he has not had intercourse, and a waiting period is unnecessary.²⁰⁶ It is also unnecessary if a female slave is very young, although if there is any chance that she might be pregnant, Ibn Hanbal says, an *istibrā'* should be observed.²⁰⁷

²⁰²See AD 119.

²⁰³See IK 354, where both agree that his heirs have done nothing wrong in assuming he was dead.

²⁰⁴This is paid to him by the new husband. See AD 121, 122.

²⁰⁵See EI, s.v. "*Istibrā'*," "The term means to make sure of the 'freedom,' that is the 'emptiness,' of the womb." The article emphasizes that the purpose of this waiting period was to ensure that the woman in question was not (or was) pregnant and therefore to avoid problems of contested paternity. Some sources also mention propriety.

²⁰⁶See IK 219 and IK 220. In IK 219, Kausaj mentions that if a man buys a female slave from an owner who has not had intercourse with her, he buys her immediately, referring to the practice of delaying the sale of a female slave (*mu'adda'a*), whereby she is given initially into the hands of a person (usually a woman) entrusted with making sure the period of *istibrā'* is observed. See EI, s.v. "*Istibrā'*," and Malik, *Mudawwana*, 3:131–132.

²⁰⁷See, for example, AD 57 and 59–61. The story referred to in AD 63 is a reference

A woman receives maintenance and lodging during her *'idda*, or only lodging, or neither, depending upon her precise status. In accordance with Qur'an 65:6, it is taken for granted in these texts that a pregnant divorcee receives both maintenance and lodging in her husband's house until she delivers: *Lodge them where ye dwell, according to your wealth, and harass them not so as to straiten life for them. And if they are with child, then spend for them till they bring forth their burden.* A woman who is not pregnant and who has been revocably divorced also has the right to maintenance and lodging, since her husband can return to her at any time during her *'idda*. There was controversy, however, about maintenance and lodging for the woman who is not pregnant and who has been irrevocably or triply divorced. This controversy often involved traditions concerning Fāṭima bt. Qais. Many different traditions with many different *isnāds* tell of Fāṭima bt. Qais, whose husband Abū 'Amr b. Hafṣ divorced her *al-batta*, or irrevocably (either all at once or for a third time). The details of the story about her vary, but they always focus on the question of whether during her *'idda* the Prophet granted her maintenance and lodging, only lodging, or neither.²⁰⁸ There are traditions to support all three positions, although it is usually agreed that she waited her *'idda* in the house of Umm Maktūm's son, who was blind and hence unable to see her in an inappropriate manner.²⁰⁹ The question is why she moved there. Traditions that support lodging during the *'idda* of all triply divorced women state that Fāṭima bt. Qais was an exception to the rule. Among the various reasons given for her removal from her husband's house are that it was isolated and she felt vulnerable, that she feared abuse from her husband's relatives, that she was vituperative toward

to one in which Abū Yūsuf, the judge, made it lawful for the Caliph Harūn al-Rashid to have intercourse immediately with a newly purchased female slave of his. A version of this story is in Richard F. Burton's edition of *The Arabian Nights, The Book of the Thousand Nights and a Night*, 14:154.

²⁰⁸See Wensinck, *Concordance*, s.v. "Fāṭima bt. Qais," for references to these traditions. See Stern, *Marriage*, pp. 136–140, for a summary treatment of them. For a full treatment of Fāṭima bt. Qais's case and a discussion of the historical development of the problem of lodging and maintenance for a woman during her *'idda*, see G. R. Hawting, "The Role of Qur'an and Hadith in the Legal Controversy about the Rights of a Divorced Woman during Her 'Waiting Period' (*'idda*)."²⁰⁹ Hawting summarizes the three possible views of lodging and maintenance for the irrevocably divorced woman—that she receive both, only lodging, or neither. He says the Hanbali position is the third. See pp. 433–435.

²⁰⁹Malik, *Muwatta'*, 3:208, says that Fāṭima waited her *'idda* in the house of Umm Sharik. See Zurqānī's commentary for reasons why her house was suitable.

them, and that the house in which she was living was not, in fact, her husband's.²¹⁰

In AD 161 and 162, Ibn Hanbal seems to support those traditions that say a triply divorced woman receives neither lodging nor maintenance. When someone quotes to him the statement of 'Umar's "We do not forsake the Book of our Lord and the *Sunna* of our Prophet," he asks what verse this refers to. The answer is *Lodge them where ye dwell* (65:6), and Ibn Hanbal says that this verse applies only to the woman who has been revocably divorced. He also says, "This statement on the authority of 'Umar is not sound."²¹¹ In AA, Ibn Hanbal again supports those traditions that say the triply divorced woman receives neither maintenance nor lodging, but in IK, he seems to support those that say she receives lodging, and this also seems to be Ibn Rāhwayh's view.²¹² Mālik and Shāfi'i both say all divorcees receive lodging. Mālik does not mention the Qur'ān, but after relating a tradition that a triply divorced woman receives lodging but no maintenance (unless she is pregnant), he says, "And this is our practice" (*wa-hādha al-amr 'indana*). Shāfi'i says 65:6 refers to all divorcees and that God did not distinguish among them.²¹³

A widow receives lodging but not maintenance (presumably, she provides for herself out of her inheritance). In AD 164, Ibn Hanbal is asked about a widow in danger of being expelled from her house. He answers by asking, rhetorically, whether there is any particular reason for her to be expelled.²¹⁴ The only reason would be if she has done something making her liable to a *hadd* punishment. If she has, she loses the right to lodging during her 'idda. Similarly, if the divor-

²¹⁰See, for example, Shāfi'i, *Umm*, 5:236, and Mālik, *Muwatta'*, 3:210, Zurgān's commentary.

²¹¹The full statement on the authority of 'Umar which Ibn Hanbal rejects here is "We do not forsake the Book of our Lord and the *sunna* of our Prophet for the words of a woman." 'Umar goes on to suggest that possibly Fātima bt. Qais forgot what really happened after her divorce. See again, for example, Mālik, *Muwatta'*, the commentary on p. 210. This statement of 'Umar's is included in traditions that support lodging for all divorcees.

²¹²The view expressed in IK is shared by Mālik and Shāfi'i, both of whom support lodging for the irrevocably divorced woman, based on verse 65:6 of the received text, which had been adopted in Iraq under Caliph 'Abd al-Mālik. See Schacht, *Origins*, p. 225. Traditions that support both lodging and maintenance are based on Ibn Mas'ūd's reading of 65:6. See again Schacht, and Jeffery, p. 102. Those that support neither maintenance nor lodging are based on the received text of 65:6, but assume, as Ibn Hanbal says (AD 160), that 65:6 refers only to the revocably divorced woman.

²¹³See Mālik, *Muwatta'*, 3:310, Shāfi'i, *Umm*, 5:235.

²¹⁴See Mālik, *Mudawwana*, 3:475-476, for a discussion of the widow's status in her house when there are debts against her husband's estate.

cée is liable to a *hadd* punishment during her 'idda, she too is deprived of her right to lodging.

There remain a few final concerns about a woman's 'idda. Ibn Hanbal and Ibn Rāhwayh both mention the comportment of the triply divorced woman and the widow; such women are expected to give up perfume and personal adornment, such as henna and kohl, and dyed or new clothing. They are also expected to go out as little as possible and not to spend the night away from home. The comportment of a revocably divorced woman is the same as that of a married woman, although Ibn Hanbal prefers that her husband not see her hair during her 'idda.

A divorcee who menstruates is believed to be at the end of her 'idda if she claims it has ended after more than one month. But if she claims it has ended in one month only, or in less than one month, some sort of proof is required.²¹⁵

If a man returns to a wife during her 'idda and then leaves her again, she must wait a new 'idda. If she is pregnant, her husband can return to her during her 'idda, as long as she has not given birth (and thereby ended her 'idda).

A man cannot remarry during his wife's 'idda if his death would render his divorce invalid and thereby create an illegal situation. Thus, if he has four wives and divorces one, he cannot marry a fifth while one is waiting an 'idda, lest his death leave five widows to inherit from him. Or, if he wishes to marry a sister of his wife's, he cannot do so until her 'idda has ended, lest he die and leave two sisters as widows of the same man.

Various Other Topics

A number of issues are touched upon more briefly than those outlined above. These include the treatment of slaves, most especially of concubines, relations between husband and wife, child custody, and the effects of conversion on marriage and divorce. Few involve either the Prophet or the Companions, and Ibn Hanbal and Ibn Rāhwayh mention almost no traditions in their answers. They do, however, sometimes mention the opinions of earlier scholars who had contributed to the ongoing consideration of these issues.

²¹⁵This might be of concern if a husband wishes to return to his wife during a non-final 'idda, or in a question of contested paternity if the wife remarries.



CHAPTER 2

Compilation of Abū Dāwūd al-Sijistānī

Chapter[s]* on Marriage

- §1 Abū Naṣr Muḥammad b. Ḥafṣ related to me [that] Abū Dāwūd said: I heard Aḥmad b. Hanbal asked about a woman who said, "I nursed a [certain] woman and her husband," and who then disavowed [what she had said] and said, "I meant [a certain woman and] her paternal uncle."¹

He said, "In both cases she is in the same position" (i.e., her testimony is not valid).

The man (i.e., the questioner) said, "She lied and then told the truth."

He said, "If she is not trustworthy (*rāḍiya*), then it makes no difference. What she said has no legal effect (*laisa bishaṭ'in*)."

- §2 [Abū Dāwūd said:] Another time, I heard Aḥmad say about this problem, "Ibn 'Abbās said, 'An oath is exacted from her, if she is trustworthy.'"¹

- §3 I heard Aḥmad asked whether a man could marry his father-in-law's *umm al-walad*.

He said, "Yes."

¹ See also IK 89. Ibn Hanbal was satisfied with Ibn 'Abbās's authority on the question of witnessing, even though he records at least two traditions in the *Musnad* contradicting Ibn 'Abbās's authority. Both are on the authority of Ibn 'Umar; one supports the Qur'anic statement that two women can be witnesses along with one man, the other says that for nursing, one woman is adequate along with one man. See *Musnad*, 2:35.

However, in the *Mudawwana*, 2:411–412, Mālik's opinion is that the testimony of one woman alone that she nursed both a husband and a wife is not enough to separate a couple, even if she is a trustworthy witness. The testimony of two women is enough, but only if they are testifying to a fact already well known by the couple's relatives and neighbors.

Compilation of Abū Dāwūd al-Sijistānī

- §4 I heard Aḥmad say, "Whenever the nursing infant is being [fed by a wet nurse] for a fee, his mother has the right to [custody of] him."

Chapter on Giving Equals in Marriage to Each Other

- §5 I heard a man say to Aḥmad, "I have a paternal first cousin who is an Arab. Shall I give her in marriage to a *maulā* (i.e., a non-Arab client)?"

He said, "No."

The man said, "But she is sickly (*da'ifa*)."

Aḥmad said, "Do not give her in marriage [to him]."

- §6 I heard Aḥmad asked about a *maulā* who marries an Arab woman. [He was asked whether] the couple should be separated.

[At first] he did not answer. Then he said, in a manner denying [that they should be separated], "[If] a man whose father accepted Islam yesterday marries a Hashimite woman, does that man allege that he is her equal?"

- §7 I said to Aḥmad, "The Prophet gave Usāma in marriage."

He said, "Usāma had fallen captive, but he was an Arab."

- §8 I asked, "If a man has nothing and a woman is wealthy, can he be considered her equal?"

He said, "I do not know, [but] the Prophet said to Fāṭima, 'Mu'āwiya is destitute, he has no wealth.'"

Chapter on Marrying^c *Dhimmi* Women

- §9 I heard Aḥmad asked whether a Muslim should marry Jewish and Christian women.

He said, "There is no harm in it if they are free, but if they are slaves, no."

- §10 I heard Aḥmad say, "Free Jewish and Christian wives are treated the same as a man's Muslim wives with regard to his dividing his time between them and providing maintenance for them."

Chapter on Marrying^d a Slave Woman in Addition to a Free One

- §11 I heard Aḥmad asked whether a man who is already married to a free woman can marry a female slave as well.

He said, "Most scholars find it reprehensible."^e

- §12 I heard Ahmad asked about marrying female slaves [in general].
He said, "The strongest opinion related concerning this matter is on the authority of Ibn 'Abbās."²
- §13 I heard Ahmad asked about a man who manumits a female slave and makes her manumission her dower.
He said, "He does not need a *walī*, but his marriage must be witnessed."³
- §14 I said to Ahmad, "What does he say [if he wants to marry her]?"
He said, "He says, 'I hereby make your manumission your dower,' and if he says, 'I hereby manumit you and make your manumission your dower,' this is valid, [because] it is connected speech, unless he has manumitted her [previously], then wishes to marry her. [In that case a dower] is due to her."
- §15 I heard Ahmad asked about a man who manumits his female slave making her manumission her dower and then divorces her before having intercourse with her.
He said, "She returns to him half her price (i.e., the price at which she would have been sold before her manumission)."
- §16 Someone said to Ahmad, "[What if] she does not have it?"
He said, "Then she is in debt for it."
- §17 I heard Ahmad asked what the minimum prerequisites were (*kam adnā mā yakūnu*) for a marriage contract.
He said, "A suitor, someone to give the bride in marriage, and two witnesses."

Chapter on Marriage [Contracts Concluded] without a *Walī*

- §18 I heard Ahmad say, "There can be no marriage without a *walī*. If there is no *walī*, then the political authority (*fas-sultān*) [gives a woman in marriage]."
- §19 I heard Ahmad say, "I choose the *qādī*; I prefer him to the governor (*amīr*) for this."
- §20 I said to Ahmad, "[There is] the *ḥadīth* of Ibn 'Abbās [that] the *ayyīm* has more right to [dispose of] herself than her *walī*."
He said, "Just as the Prophet revoked the marriage of Khansā bt. Khidhām."

²The two conditions usually given that necessitate marriage with a slave rather than a free woman are a man's inability to afford a free wife's dower and fear that if he remains single he will commit an act of fornication. Ibn 'Abbās's name is associated with the insistence that both conditions be present. See Ibn Qudāma, *al-Mughnī*, 7:509-510.

- §21 I asked, "What about the *bikr*? We do not give her in marriage, do we, until we ask her permission?"
He said, "No."
I said, "What if she is given in marriage [without her consent]?"
He became apprehensive⁴ about saying anything concerning her.
- §22 I said to Ahmad, "If it (i.e., the marriage of the *bikr* without her consent) is not valid, that makes her and the *ayyīm* the same."
He said, "No, how are they the same?! For the *thayyib* speaks and chooses for herself. Further, a marriage cannot be concluded without a *walī*, and the *bikr* is consulted, so it (i.e., the marriage) is most pleasing to her." Or, he said something like this (*aw kalāmun yushbihu ḥadhā*).
- §23 I heard Ahmad asked about a man who is [both a woman's] paternal cousin and *walī*, "Can he give her in marriage to himself?"
He said, "No, but he can authorize another man to give her in marriage to him." Then he adduced the *ḥadīth* of al-Mughīra b. Shu'ba.
Abū Dāwūd said: [This is] the *ḥadīth* of 'Abd al-Malik b. 'Umar that al-Mughīra b. Shu'ba authorized another man to have a certain woman given in marriage to him, even though al-Mughīra was himself a closer *walī* of hers than the other man.
- §24 Ahmad was asked about a man who wants to marry the daughter of one of his female slaves.
He said, "He authorizes another man to give her in marriage to him, and he does so."

Chapter on Giving Minors in Marriage

- §25 I said to Ahmad, "Does a son have the option [of dissolving his marriage] if his father gives him in marriage, that is, when he is a minor?"
He said, "No."
- §26 I heard Ahmad asked whether the orphan girl can be given in marriage.
He said, "No one gives a girl in marriage except her father, unless she has reached nine years of age."
Someone said to Ahmad while I was listening, "Then once she has reached nine years of age, she can be given in marriage [by someone other than her father]."
He said, "Yes, when her permission is sought and she has granted it."⁵

- §27 I said to Ahmad, "[What if] a man gives his son in marriage when he is a minor and then the son or his spouse dies?"
He said, "Mutual rights of inheritance prevail between the couple."
§28 I heard Ahmad asked about the orphan girl given in marriage before she comes of age and then she or her husband dies, "Do mutual rights of inheritance prevail between the couple?"
He said, "There is disagreement about this; Qatāda said they do not."³

Chapter on the *Walī* Who Is an Unbeliever

- §29 I heard Ahmad asked about a Magian,⁴ "If his sister accepts Islam, should the two be separated?"
He said, "If it is feared that he might act as her *walī*, yes."
§30 I heard Ahmad asked about a Magian, "May he take a [Muslim] female relative on a trip or give her in marriage?"
He said, "He is not her *walī*."
§31 I heard Ahmad asked about the partially manumitted (*mukātab*) slave, "Can he marry without his master's permission?"
He said, "No."
§32 I heard Ahmad asked about a slave who has been given the legal right to trade (*ma'dhūn*), "Can he marry without the permission of his master?"
He said, "No."⁵
§33 I heard Ahmad asked about a slave who marries without his master's permission. Then the master learns of it, but keeps silent. "Do you consider this marriage valid (*aturāhu jā'izan*)?"
Ahmad said, "No, even if the master says, 'I validate it,' [it is not valid] until they (i.e., master and slave) conclude a new contract."
Ahmad said [in addition], "Ibn 'Umar said, 'Such a case is fornication and the slave is beaten for it.'"⁶

³The question asked here assumes that a minor virgin should not, in the absence of her father, be given in marriage by her guardian. But if she is, and then she or her spouse dies, there is disagreement about whether the rights of inheritance established by a valid marriage prevail. After noting disagreement on the matter, Ibn Hanbal offers the Successor Qatāda's view, and by implication his own, that they do not.

⁴Both the *mukātab* and the *ma'dhūn* remain slaves and therefore cannot marry without permission. See EI, s.v. "Abd," for information on various types of slave.

⁵See Abū Dāwūd, *Sunan*, 2:180, for two traditions (with different *isnads*) that say the slave who marries without his master's permission is a fornicator. See also Ibn Han-

- §34 I heard Ahmad asked about a man who marries a woman on the condition that he take her to Khurāsān, thinking that when he takes her to Khurāsān he can let her go there (i.e., abandon her),⁷ where she would be destitute.
He said, "No [he should not do that]. It resembles a *mu'ā* marriage, unless he marries her on the condition that she be his wife as long as she lives."⁸

Chapter on *Tafwid*¹

- §35 I heard Ahmad asked about a woman's *walīs* who give her in marriage for less than her fair dower.
He said, "If she consents, then it is a valid marriage."
§36 Someone said to Ahmad, "Then [the validity of] the marriage does not depend (*yalhaqu*) on her dower being a fair one?"
He said, "No, not if she has consented [to be married for less than her fair dower]."
§37 I heard Ahmad asked about a woman's fair dower.
He said, "It is the dower given to the women in her family."
§38 Someone said to Ahmad, "Ishāq b. Ibrāhīm, that is al-Marwazi, says five hundred dirhams [is a fair dower]." But Ahmad found that objectionable (*ankarahu*).
§39 I heard him say, "If a woman says, 'Give me in marriage for one thousand dirhams,' and he (i.e., her guardian) says, 'I give you in marriage for five hundred,' and her fair dower is ten thousand, she should receive one thousand, because she made her body available [for that sum] and was content [with it]."
§40 I said to Ahmad, "[What about] the *ḥadīth* of Ma'qil b. Yāsār—the story of Barwā' bt. Wāshiq?" [I asked whether] he followed it (*yadhabu ilaihi*).
He said, "Yes."⁹
§41 I said to Ahmad, "[What if] a man marries a woman for a dower consisting of a female slave and gives her the slave. Then

bal, *Musnad*, 3:300–301, 377, 382. But see Shaibānī, *al-Jāmi'*, p. 85, where both he and Abū Yūsuf sanction the master's retroactive validation of such a marriage.

⁴Ibn Hanbal is against *mu'ā*, or temporary marriage. Here he speaks against a hidden intention. Since he is against *mu'ā*, he does not approve of such a thought, but cannot say definitely that this marriage is forbidden.

⁵In *ḥadīths* about Barwā', Ma'qil b. Yāsār al-Muzani and Ma'qil b. Sinān al-Ashja'i, both Companions of the Prophet, are often interchanged. See, for example, Abū Dāwūd, *Sunan*, 2:189–190; Ibn Hanbal, *Musnad*, 4:279–280; Nasa'i, *Sunan*, 6:121; Tirmidhī, *Sunan*, 2:406–407. See also Schacht, *Origins*, pp. 29 and 50, for this *ḥadīth*.

the slave dies, and the man divorces his wife before having intercourse with her?"

He said, "He claims from his wife half the price of the slave."

§42 I said to Ahmad, "But what if the slave bore a slave son?"

He said, "He [still] claims from his wife half of the slave's price. Don't you see that if he marries her for [a dower of] one thousand dirhams and gives them to her so she keeps them for a year (*famakatha 'indahā sanatān*), then he divorces her [before having intercourse with her], she is entitled to the increase?^m She returns to him five hundred dirhams."

§43 I heard Ahmad asked about a man who spends time alone with his wife while the two of them are fasting, but not in Ramadan, so that the door has been locked and the curtain let down.

He said, "A dower is required (*wajaba*)."

§44 Someone said, "What about during Ramadan?"

He said, "Ramadan is a different case."

§45 Someone said, "What if he is traveling in Ramadan?"

He said, "Then he is already breaking the fast; that is, if the husband is alone with his wife privately, then the door has been locked and the curtain let down, and a dower is required."

Chapter on the Divorce Gift (*Mut'a*)

§46 I heard Ahmad asked about a divorce gift [for a woman].

He said, "Such a gift is obligatory (*awjab*) for a man who has not specified a dower; if he has specified a dower, it is not."

§47 [However,] I have [also] heard Ahmad say that it is preferable (*yustahabbu*) that a man give a woman a divorce gift, even if he has specified a dower.

§48 I heard Ahmad asked about a man who first marries a woman for whom he has not specified a dower, then makes her a present of a male slave, and then finally divorces her.

He said, "She receives a divorce gift."

§49 I heard Ahmad asked how much the divorce gift should be.

He said, "In accordance with a man's means."

Someone said, "Ten thousand dirhams?"

He said, "It should be in accordance with his means." [Then] he said, "In accordance with what the judge (*hākim*) thinks fitting."

§50 I heard Ahmad asked about a man who marries a woman for a dower of two specific female slaves.

He said, "That is permissible (*jā'iz*)."

Someone said, "What if one of the slaves becomes free?"

He said, "Then the wife is owed her price."

§51 I heard Ahmad asked about a man who marries a woman on the condition that he will not expel her from her house.

He said, "Then he can never expel her from her house. The Prophet said, 'The best of conditions is the one that fulfills the prerequisites for women being lawful to you.'"

Chapter on *Istibrā'* and on a Husband Providing His Wife with Maintenance

§52 I heard Ahmad asked about a man [who] when [his wife's] dower is demanded of him will not hand it over. Is he liable for maintenance?

He said, "Yes, he is, because the withholding is on his part. He is obliged (*yanbaghi*) to give [his wife] a dower."

§53 I heard Ahmad asked [whether] a man can have intercourse with two sisters at the same time.

He said, "No," and "Praise be to God!" rejecting that [possibility].

§54 I heard Ahmad say about [a man] owning two slave sisters, "He cannot have intercourse with the second one until the body of the [first] one with whom he has had intercourse becomes forbidden to him." Or, he said, "Until he no longer owns the first one."

§55 I heard Ahmad asked about a man who buys a [slave] mother and daughter but does not wait an *istibrā'* on behalf of either of them. [He was asked whether] he can have intercourse with whichever one he prefers.

He said, "Yes," and if he has intercourse with one, the other is forbidden him."

§56 I heard Ahmad say, "A man waits an *istibrā'* of one menstrual period for a female slave who menstruates. If she does not menstruate, he waits three months."

Ahmad said to me, "[He waits three months] because the shortest time in which a child appears is [first] forty days as a drop of sperm, then forty days as a clot, then it becomes flesh."ⁿ

ⁿSee Ibn Hanbal, *Musnad*, 1:374, for a tradition that gives the same description of the development of a fetus. See Qur'an 23:12-14, for the creation of man, and see B. F. Musallam, *Sex and Society in Islam*, pp. 53-54, for medieval Muslim ideas about prenatal development.

- §57 I [also] heard Ahmad say, "A woman may become pregnant before she menstruates."
- §58 I heard Ahmad asked whether a man who buys a female slave may be physically intimate with her, as long as he does not actually have sexual intercourse with her.
He said, "Not during the *istibrā'*, if she is old enough to have intercourse."
- §59 I heard Ahmad asked about an *istibrā'* for a girl of ten, and he thought there should be one."
- §60 I heard Ahmad say, "A girl of ten years of age may become pregnant."
- §61 Someone said to Ahmad while I was listening, "Even if she is too young to menstruate (*saghīra*)?"
He said, "If she is [very] young, that is, if she is still suckling, then waiting an *istibrā'* has no legal consequences."
- §62 I heard Ahmad asked about a man who buys a female slave who has stopped menstruating.
He said, "He waits [an *istibrā'*] (*yatarabbasu*) on her behalf of three months."
- §63 I heard Ahmad asked about a man who buys a female slave married to a husband who has not had intercourse with her and who divorces her when she is bought. [He was asked whether] the new owner can have intercourse with her before waiting an *istibrā'*.
He said, "This is a stratagem (*hīla*) devised by the *ashāb al-ra'y*. He must wait an *istibrā'*." Abū 'Abd Allāh [Ahmad b. Hanbal] said, "And [further], they claim, that is, the *ahl al-ra'y* claim, that if a man buys a female slave and then manumits and marries her, he can have intercourse with her right away. I prefer (*aḥabbu ilaiya*) that he wait an *istibrā'*."⁹
- §64 I heard Ahmad asked about a man who buys a female slave, then has intercourse with her before waiting an *istibrā'*.
He said, "I definitely prefer (*ammā anā fayu'jibunī*) that he wait [until she has] another menstrual period [before he has intercourse with her again]."

⁹Ibn Hanbal is against legal stratagems (*hīlas*), as are all Hanbalis. *Ashāb*- or *ahl-al-ra'y* (followers of opinion) is a term of opprobrium used by traditionists to refer to Abū Hanīfa and his circle to accuse them of depending too much on their own opinion and not on *ḥadīth*. See Schacht, *Origins*, ch. 9, passim. See *El*, s.v. "*Hīla*," for the use of stratagems by the Hanafī school. This particular stratagem is to change a female slave's status from a woman who has acquired a new owner to a woman divorced before intercourse who need not wait an *idda*.

Chapter on a Slave Taking a Concubine

- §65 I heard Ahmad asked whether a slave can take a concubine using his master's wealth, as long as he has his master's permission.
He said, "Yes."
Someone said, "Can he do so without his master's permission?"
He said, "No."¹⁰

Chapter on Coitus Interruptus and Other Things and on Divorce before Intercourse¹¹

- §66 I heard Ahmad b. Hanbal say, "A man practices coitus interruptus with a free woman only with her permission. However, he may practice it with a female slave whom he owns without her permission."¹¹

Chapter on Declaring a Triple Divorce

- §67 Abū Dāwūd said: I heard Ahmad asked about a man who divorces his wife triply in one statement, and he did not consider that appropriate (*walam yara dhālika*).
- §68 I heard Ahmad say, more than once, concerning a man who says, "Every woman I marry is triply divorced," "If he does (i.e., marry), I do not order him to separate from his wife."
[Further,] he said, "If he has parents who order him to marry, I too order him to marry. Or, if he is a youth from whom one fears fornication, then I order him to marry."
Abū Dāwūd said: Perhaps Ahmad said concerning such a man that if he specifies a certain woman [in his premarital divorce statement], he is permitted to marry a different woman.¹²
- §69 I heard Ahmad asked about a man who says to his wife, "You are divorced," meaning triply.
Ahmad said, "It counts as a single divorce." Then he said,

¹⁰But see Abū Yūsuf, #598, where it is reported on the authority of Hammād and Ibrāhīm that a slave cannot take a concubine because slaves cannot own anything.

¹¹See Musallam, ch. 2, for the right of a master to practice coitus interruptus with a concubine without asking her permission. A free wife must grant her permission.

¹²See also AA 109, where Ibn Hanbal relates a number of traditions against divorce before marriage. See Ibn Hanbal, *Musnad*, 2:189, for one of these traditions. See also Abū Dāwūd, *Sunan*, 2:211–212 (*talāq* 7), for another.

"They claim that Ishāq, that is, Ibn Rāhwayh, holds (*yadhabu*) that this is a triple divorce and that he took that position because of the *ḥadīth* 'Actions are in accordance with their intentions.' But this is not one of those cases. Do you think if a man intended to divorce his wife and then did not utter a word, *that* would be a divorce?"¹³

- §70 'Isaw Ahmad [when] a sheet of paper was brought to him [on which was written], "A man from Dinawar said he had a paternal first cousin, [and that] if he married her she would be triply divorced. Then he married her, and she remained with him one year. Do you think he should separate from her?" Ahmad returned the sheet, on which was written, "He does not separate from her, he stays with her (*yuqīmu 'alaihā*)."

Chapter on *Khalīya* and *Barīya*

- §71 I heard Ahmad asked about *batta*, *khalīya*, *barīya*, and *bā'in* [divorces].
He said, "I avoid saying anything about them, [but] I fear (*akhāfu*) that [each one] is triple."
And he said (i.e., Abū Dāwūd): Perhaps I heard Ahmad say, "I do not give a *fatwā* about this."
§72 I said to Ahmad, "Are *khalīya*, *barīya*, *bā'in*, and *batta* divorces the same in the case of the *bikr* and the *thayyib*?"
He said, "As far as I am concerned, they are."
§73 I heard Ahmad asked about the *ḥadīth* of Rukāna, [whether] it does not firmly establish the fact that he divorced his wife with *batta*.
He said, "No, because Ibn Ishāq relates it on the authority of Dāwūd b. al-Husain on the authority of 'Ikrima on the authority of Ibn 'Abbās, that Rukāna divorced his wife triply."
Ahmad said, "The Madinese call a triple [divorce] *batta*."
Abū Dāwūd said: "Ahmad said, 'The Rawāfid relate [that] if

¹³In this response, a husband clearly says one thing but actually means another. For Ibn Hanbal there can be no question that the husband's statement is clear and means what it says. The *ḥadīth* "Actions are in accordance with their intentions," when referred to in the context of divorce, is usually used in conjunction with a divorce statement in which no word with the root *ḥ-l-q*, has been used, and Ibn Hanbal rejects its application here. See, for example, Bukhārī, *Sahih*, 3:403 (*talāq* 6), and Abū Dāwūd, *Sunan*, 2:216.

See IK 317, where Ibn Rāhwayh does say that a man who means to pronounce a divorce but is prevented from uttering a divorce statement is, in fact, divorced.

a man divorces his wife triply [in one session], it counts as a single divorce, or nothing." Or he (i.e., Ahmad) said, "It has no legal consequences."¹⁴

Chapter on [A Man's Declaring His Wife] Forbidden

- §74 I heard Ahmad say, "If a man says everything lawful for him is (forbidden) *ḥarām* [and he adds], 'I mean by this, divorce,' he has articulated it, [so] I am afraid [this statement results in] a triple divorce, but I do not give a *fatwā* on it."
Someone said to Ahmad, "Do you consider it a divorce [at all]?"
He said, "No, not unless he actually utters it (i.e., the words 'I mean by this, divorce')."
§75 I heard Ahmad asked about a man who says, "Everything Allāh has made lawful to me is forbidden," meaning by this statement, divorce.
[Ahmad said,] "But I do not give a *fatwā* about this."
§76 I heard Ahmad say, "If a man says, 'Whomever I turn to (*mā anqalibu ilaihi*, i.e., his wife) is *ḥarām*,'* I order him to do the expiation for *zihār*."
Someone said, "When does he violate his oath (i.e., when does it become incumbent upon him to expiate his oath)?"
He said, "When he has finished speaking."¹⁵
§77 I heard Ahmad asked about a man who says, "What Allāh has made lawful to me is forbidden."
He asked, "Does he have a wife?"
The questioner said, "Yes."
Ahmad said, "Then he must perform the expiation for *zihār*."

¹⁴In his *Musnad*, Ibn Hanbal has a *ḥadīth* with a *matn* that Rukāna divorced his wife triply in one session, and the Prophet said it counted as a single divorce (1:265). In this response Ibn Hanbal uses this *ḥadīth* to counter the idea that Rukāna divorced his wife *batta* (and not triply), then he says the Madinese call triple divorce, divorce with *batta*. Thus, a *ḥadīth* that relates that Rukāna divorced his wife with *batta* shows the same thing as one that says he divorced her triply, and neither can be used to prove anything about the meaning of *batta*.

Ibn Hanbal ends this response by referring to the Rawāfid, which can only be pejorative. Triple divorce pronounced in one session must have legal consequences. See EI, s.v. "Rāfidites," for the Rawāfid.

¹⁵Ibn Hanbal considers this statement an oath of *zihār*. Therefore, if a man does not wish it to be binding, he must expiate it. See Russell and Suhrwardy, #476 and notes. There, a similar statement is considered one that produces a triple divorce.

A man said, "Why, Abū 'Abd Allāh [Aḥmad b. Hanbal], do you make him perform the expiation for *zihār*?"

He replied, "What does the man divorcing his wife by means of *zihār* (*al-muḏāhir*) say? He says, 'You are to me like the back of my mother.'"

- §78 I heard Aḥmad more than once give this significance (i.e., that of *zihār*) to a [statement of divorce that includes the word] *ḥarām* (forbidden). [Further] he said, "If such a man does not have a wife, he must still expiate his oath."

Chapter on "Your Matter Is in Your Hands"

- §79 I heard Aḥmad say [something] about a man who says to his wife, "Your matter is in your hands," and she divorces herself triply. Then the man says, "But I meant a single divorce."

Aḥmad said, "The decision is hers (*al-qadā' mā qadat*)."

I heard him give a *fatwā* to this effect more than once.

- §80 I heard Aḥmad asked, "What if he says to his wife, 'Your matter is in your hands,' and she divorces herself singly, but he says, 'I meant triply?'"

Aḥmad said, "It is a single divorce."

- §81 I heard Aḥmad asked, "What if he says, 'Your matter is in your hands,' and she says, 'I choose myself?'"

He said, "This is a single divorce, and he has the right to return to her."

- §82 I heard Aḥmad reply [when] someone said to him, "What if he says, 'Divorce yourself singly, [so that] I have the right of returning to you,' and his wife divorces herself triply?"

[He said,] "It counts as a single divorce; he has the right to return to her."

- §83 I heard Aḥmad asked about a man who says, just before going on a pilgrimage, "My wife's matter is in a certain man's hands."

Aḥmad said, "Then her matter is in that man's hands."

- §84 I heard Aḥmad say, "If a man says to his wife, 'Your matter is in your hands,' then her matter is in her hands until she replies to him, or he has intercourse with her." He adduced the *ḥadīth* of Zabrah¹⁶ to whom Ḥafṣa said, "Your matter is in your hands, as long as he has not had intercourse with you."¹⁶

¹⁶ Ibn Hanbal refers in this response to the *ḥadīth* in which Zabrah, a slave of the Banū 'Adī, said that when she was manumitted, Ḥafṣa (bt. 'Umar), the Prophet's wife, informed her that her manumission itself gave her the option of divorcing her husband, as long as he had not had intercourse with her. For this *ḥadīth*, see, for example, Mālik, *Muwatta'*, 3: 182. See also Mālik, *Mudawwana*, 3: 30-31.

Chapter on *Takhyir*

- §85 I heard Aḥmad asked about someone who says to his wife, "Choose!" and she says, "I choose myself."

He said, "This is a single divorce, and he has the right to return to her."

- §86 I heard Aḥmad say, "If he gives her the choice of divorcing him and then has intercourse with her while they are having that conversation, her choice ceases."

- §87 I heard Aḥmad say, "The choice must be [taken up] while they are face to face (*'alā mukhātabati-l-kalām*), before [they have finished] answering each other [then and there]."

Chapter on Whenever a Husband Says [to His Wife]

"Begin an 'Idda" or "Return to Your Family"

- §88 I heard Aḥmad asked about someone who says to his wife, "Begin an 'idda, begin an 'idda!" and he means [by this] to divorce her.

[Aḥmad said], "Then she is divorced."

[Aḥmad was asked what happens] if he says, "I did not mean to divorce her?"

He said, "I do not know and I am afraid [to answer]."

- §89 I heard Aḥmad asked about a man who says to his wife, "Get out!" or "Return to your family!" wanting [by what he says] to reform her.

He said, "If he did not intend a divorce, then there is none."^{16b}

Chapter on Statements Which Resemble Divorce [Statements]

- §90 I heard Aḥmad asked about a man who says to his wife, "I have no wife."

He said, "I am afraid that a divorce occurs."

- §91 I heard Aḥmad when he was asked about someone who says to his wife, "May Allāh separate us in this world and the next."

He said, "If he meant to use this statement only as an invocation, then I prefer (*arjū*) that his statement be of no legal consequences (*laisa bi-sha'im*)."

Chapter on the Divorce of the Intoxicated Man

- §92 I heard Aḥmad asked more than once about the divorce of the intoxicated man, but he would not answer. Once he said, "I

do not give a *fatwā* about anything to do with this matter. Ask someone else."

Abū Dāwūd said: Once someone said to him, "As long as the intoxicated man is rational?"

He said, "Ask someone else about this."

Chapter on the *Bikr* Who Is Triply Divorced

- §93 I heard Ahmad asked about a *bikr* who is divorced triply. He said, "[Such a divorce is] triple, and her former husband is not allowed (*lā yahlilu lahu*) to [re]marry her until she has been married to another man."

Chapter on Intention in Divorce [Statements]

- §94 I heard Ahmad asked about a man who has two wives named Fātima, then one dies and the man says, "A certain one (*fulāna*) is divorced," meaning the deceased.

He said, "The deceased is divorced," [but] Ahmad perhaps wished not to give credence to this judgment.

- §95 I said to Ahmad, "A man marries a woman and then a second man says to him, 'You have a wife,' meaning another wife. Then the man says, 'Every wife I have is divorced,' and falls silent, at which point the second man says, 'Except so and so,' and he says, 'Except so and so; I did not mean her.'"

Ahmad refused to give me a *fatwā* on this case.

Chapter on Pronouncing Divorce under One's Breath and on Dividing^{dd} Divorce

- §96 I heard Ahmad asked about a man who says to his wife, "You are divorced half a divorce."

He said, "It is one [full] divorce."

Someone said to Ahmad while I was listening, "What if the man meant to halve the divorce?"

He said, "It does not obtain. I do not consider his intention; it is one [full] divorce."

- §97 I heard Ahmad asked about a man who pronounces a divorce under his breath, who does not utter it aloud [clearly] but intends it.

He said, "I prefer (*arjū*) that it be of no legal consequence."

Chapter on Divorce at a Later Time

- §98 I said to Ahmad, "A man says to his wife, 'You are divorced triply if a certain man wants you to be.'" Someone else said to Ahmad, "Then that certain man hears about this and says, 'I want her to be.'"

He said, "She is triply divorced."

- §99 I heard Ahmad when he was asked about a man who said, "If I do not do this or that, my wife is divorced. . . ."

It was his opinion that the man. . . ."

- §100 I said to Ahmad, "What if a man says to his wife, 'You are divorced in a month?'"

He said, "She is divorced as soon as the following month starts."

- §101 I heard Ahmad asked about a man who says to his wife, in the month of Sha'bān, "You are divorced on *lailat al-qadr*."¹⁷ [He was asked], "Does such a man withdraw from his wife when the tenth (i.e., of Ramaḍān) starts?"

He said, "It has been said [that *lailat al-qadr* falls on] the tenth. The Madinese relate that it [falls on] the seventeenth, except that it has been firmly established on the authority of the Prophet (*al-muthbat 'an al-nabi*) [that it starts during] the last ten days of Ramaḍān."

Chapter on *Ilā'*

- §102 I heard Ahmad b. Muḥammad [b. Hanbal] say, "An oath of *ilā'* suspends [a marriage]."

- §103 I heard Ahmad b. Hanbal asked about someone who says to his wife, "If I do not have intercourse^{ee} with you for a year, you are divorced," and then leaves her for a year. Is she divorced?

He said, "No, she remains his wife until the marriage is suspended."

- §104 I heard Ahmad asked about a man who says to his wife, "By God I will not have intercourse with you for four months."

Ahmad said, "A state of *ilā'* does not occur until more than four months have passed."

- §105 I heard Ahmad [when] someone said to him, "[What] about [a man accepting his legal responsibility to have] intercourse [with his wife] without actually performing the act?"

¹⁷For *lailat al-qadr*, see EI, s.v. "Kadr."

He said, "If such a man is ill or imprisoned, he affirms (*yash-hadu*) [his intention to have intercourse with her], and [the same holds true] whenever his wife [has a physical condition placing her] among those women with whom one does not have intercourse."

Chapter on *Zihār*

§106 I heard Aḥmad say about a man who says to his wife, "If I do not remove myself from you, you are to me like the back of my mother," [that] if that occurs at a time when he already knows he is not pleased [with her], he violates his oath.

§107 I said to Aḥmad, "If a man repudiates his wife by means of *zihār*, is their marriage suspended?"

He said, "No, because *zihār* is not *ilāʾ*."

§108 I said to Aḥmad, "Then he is hindering his wife from remarrying."^{hh}

He said, "He must not do so."

§109 I said to Aḥmad, "Can a man repudiate his female slave by means of *zihār*?"

He said, "If she is his property, it is as if he has made her forbidden (*ḥarām*) to him, and he must expiate his oath. But if she is a slave whom he has married and then repudiated by means of *zihār*, he must do the expiation for *zihār*."

Someone said, "What about the *umm al-walad*? Can he repudiate her by means of *zihār*?"

He said, "[No, *zihār* is not applicable to her because] she is his property [rather than his wife]."

§110 I heard Aḥmad asked about feeding [sixty poor people for expiation] in the case of *zihār*.

He said, "A *mudd* of wheat is given to each poor person."

Someone said, "Can flour be substituted for wheat?"

He said, "A *mudd* can."

Someone said, "Then the measure given for flour is the same as the measure for wheat?"

He said, "Yes."

§111 I heard Aḥmad asked about a man who must do the expiation for *zihār* who is able to fast if he exerts himself, but is too feeble to earn [enough to free a slave or feed sixty poor].

Aḥmad said, "He fasts. Indeed, Allāh said, *And he who findeth not (the wherewithal), . . .* (58:4)"

§112 I heard Aḥmad asked whether a man [who is fasting to expiate his oath of *zihār* and] who breaks his fast because of illness must fast again [once he becomes well].

Aḥmad said, "I prefer that he be excused."

§113 I heard Aḥmad asked about a man who is fasting to expiate his oath of *zihār*. "Can he spend the night with his wife [before completing his fast]?"

He said, "He must complete his fast. Allāh said, *Before they touch one another* (58:4)."

§114 I heard Aḥmad asked about a man who must fast two consecutive months [to expiate his oath of *zihār*] but breaks his fast one day too soon. [He was asked,] "Does such a man repeat his fast?"

He said, "Rather, he fasts one day."

Chapter on the *Mafqūd*

§115 More than once I heard Abū 'Abd Allāh Aḥmad b. Hanbal say, when asked about the *mafqūd*. "We think he is a man who is among his relatives, but one morning, is not found among them." Sometimes he adduced the *ḥadīth* of Ibn Abī Lailā about the man whom *jinn* carried away and whose wife came to 'Umar. Or [he pointed out that] the man might be on a military expedition in which some will be killed and others come back. Or, sometimes, he adduced, concerning the *mafqūd*, the *ḥadīth* of Abū 'Amr al-Shaibānī that some men went on a military expedition against the Greeks, and 'Umar ordered their wives to start the period of waiting for them. Or [he pointed out that] the men might be on the sea and out of contact. And he [again] adduced, concerning the *mafqūd*, the *ḥadīth* about 'Umar b. 'Abd al-'Azīz.

Further, I heard Aḥmad say, "The wife of a missing husband should wait four years, then four months and ten days."

Someone said, "Should the judge (*wālī*)ⁱⁱ be brought into the matter?"

He said, "There is disagreement on this. Some say it is best that he divorce her."^{kk}

§116 I heard Aḥmad say, "If a man goes to Mecca, then on to the Yemen, to my mind he is not a *mafqūd*."

§117 I heard Aḥmad asked about a man who went to Basra twenty years ago and who has not been heard of since. [He was asked whether] his wife could marry.

Ahmad said, "He is not a *mafqud*. Perhaps he went to China. Really, the *mafqud*—" Then he related (*qassa*) the example of the *mafqud* which I have already mentioned.

- §118 I heard Ahmad when someone said to him, "Do you know anything about the *mafqud*, because two certain people (*fa'inna fulānan wafulānan*, i.e., individuals the questioner had in mind) do not give *fatwas* concerning him?" [I heard him say,] "What I know about the *mafqud*¹⁸ is that five of the Prophet's Companions ordered a woman to wait [four years for her missing husband to return]."

Ahmad said, "Such a person is, to my mind, ill-informed." He meant that the man who has nothing to say about the *mafqud* is ill-informed.

- §119 Abū Dāwūd said: I heard Ahmad asked about the slave wife whose husband is a *mafqud*.

He said, "On the basis of interpreting (*ta'wil*) [this case in accordance with others], she waits two years [before starting an '*idda*']."

Abū Dāwūd said: I do not know whether he mentioned two (i.e., rather than four) months (i.e., as part of her '*idda*'). Another time Ahmad said, to the same effect, "They interpret, in this case (i.e., that of the slave woman), on the basis of one-half what the free woman waits."

- §120 I heard Ahmad say, "If the *mafqud* [returns home and] chooses his wife, she waits an '*idda*' [before being completely separated] from her current husband."

- §121 I heard Ahmad asked about the *mafqud* [who has returned] when he chooses the dower. He said, "He is given the same dower he [initially] gave his wife."

- §122 Someone said to Ahmad while I was listening, "Does the [second] husband give [it to the first]?"

He said, "Yes."

Someone said, "[Even if] it is ten thousand [dinars]?"

He said, "Yes. The [second] husband pays it."

- §123 I heard Ahmad asked about the *mafqud* who returns home and whose *umm al-walads* have married.

He said, "They are returned to him."^{mm}

- §124 I heard Ahmad asked about the inheritance of the *mafqud*, about when it is divided up.

He said, "When four years, four months, and ten days have passed."

Someone said to Ahmad, "Is the judge involved (*ya'tūna al-wāli*)?"

He said, "If he is brought [into the picture], he does not give a ruling on this question."

- §125 I heard Ahmad asked about the *mafqud* who returns and whose inheritance has been divided up.

He said, "He retrieves whatever he can actually recover."

- §126 I said to Ahmad, "If a slave runs away from his wife who is also a slave, is this considered a separation?"

He said, "No."

- §127 When someone said to Ahmad that Mālik had said the inheritance of the *mafqud* is divided up after eighty years, I heard him say, "This does not resemble any doctrine (*qawl*)."¹⁸

- §128 I heard Ahmad asked about the impotent husband.

He said, "The impotent husband is given a year from the day on which his wife first brought the matter to the attention of the judge (*imām*)."¹⁹

Someone said to Ahmad, "What if he claims the marriage has been consummated?"

He said, "If the wife was a *bikr* [when she married], women should examine her. If she was a *thayyib*, 'Atā' said the husband should bring a sample of semen in a piece of cloth. As for Samura b. Jundub, he gave him (i.e., the husband) in marriage."²⁰

- §129 Someone said to Ahmad while I was listening, "Perhaps he will bring someone else's semen."

He said, "If he is put in a room with her, in the case of the *thayyib*, how can he bring someone else's?"

- §130 I said, "What about the opinion of those who say he might bring egg white?"

¹⁸See Mālik, *Mudawwana*, 2:452, for Mālik's doctrine that the inheritance of the *mafqud* is divided up only after it is certain he is dead, or after enough time has passed so that someone of his expected life span is probably dead. See also Ibn Qudāma, 9:131–132, for a discussion of various opinions of Ibn Hanbal's about the *mafqud*. See Schacht, *Origins*, p. 211, for the development of doctrine about the *mafqud*.

¹⁹See Musallam, pp. 32–34, for discussion of a free woman's right to her own children.

²⁰In one version of this story, a woman complained to the Basran scholar Samura b. Jundab about her husband's impotence. Samura wrote to the Caliph Mu'āwiya for guidance. Mu'āwiya wrote back that Samura should give the husband in marriage to a beautiful, upright woman and pay her dower out of the public treasury. If the husband still proved impotent, the original wife would not have been lying. See Ibn Qudāma, 7:618.

He said, "Egg white solidifies, but semen burns up; that is, when it is thrown on fire."

Chapter on [the Husband] Who Cannot Afford
[His Wife's] Maintenance

- §131 Abū Dāwūd said: I heard Ahmad criticize the position of a man who will not give a *fatwā* to the effect that a husband who cannot afford his wife's maintenance should let her choose [to divorce him].

Ahmad said, "Such a man is leaving his wife destitute [if he does not do so]. Further, Sa'īd b. al-Musaiyab held that it was *sunna*."

Ahmad said, "As far as I am concerned when a man does not speak [e.g., give a *fatwā*], either about the *mafqud* or about the husband who cannot afford his wife's maintenance, he is ill-informed."

On the matter of a wife's maintenance, Ahmad adduced the *ḥadīth* about 'Umar's writing to the commanders of the troops that they (i.e., the soldiers) should either send home maintenance for their wives or divorce them.²¹

Chapter on the *Mukhtalī'a*

- §132 I heard Ahmad asked about the woman who initiates a divorce by *khuḷ'* (*mukhtalī'a*). [He was asked whether] the husband takes back from his wife more than he gave her [as a dower].

He said, "No, I do not like him to do that (*lā yu'jibunī*)."

- §133 I heard Ahmad asked about a woman who says to her husband, "*Ikhla'nī* (i.e., divorce me by *khuḷ'*) for the dirhams I have in my hand" and who dupes him because there is no money in her hand, but he divorces her for that [amount].

He said, "The smallest amount [for which he should free her] is three dirhams."²²

²¹See Shāfi'i, *Umm*, 5:107, where Abū'l-Zinād is reported to have asked Sa'īd b. al-Musaiyab about a man unable to provide maintenance for his wife. Ibn al-Musaiyab replied that the couple were separated. Abū'l-Zinād asked if that were *sunna* and Ibn al-Musaiyab said it was. Abū'l-Zinād adds that when Ibn al-Musaiyab said *sunna*, that meant *sunna* of the Prophet. On the authority of Ibn 'Umar, Shāfi'i himself relates the *ḥadīth* of 'Umar writing to inform army commanders that their soldiers should either send home maintenance for their wives or divorce them.

²²Ibn Qudāma, 8:188 says that Ibn Hanbal said this because three is the least number for which one would use the plural of "dirham."

- §134 I heard Ahmad asked whether a *ṭalāq* [statement of] divorce has any legal force (*yalhaquhā al-ṭalāq*) for the *mukhtalī'a*.
He said, "No, it does not."

Chapter on *Li'ān* after *Ṭalāq*

- §135 I heard Ahmad asked, "[What] if a man divorces his wife triply, then slanders her, and then she gives birth?"
He said, "There cannot be *li'ān* between them. Allāh said, *Those who accuse their wives . . .* (24:6), and this woman is not a wife."

- §136 I heard Ahmad asked whether there can be *li'ān* between a free man and a female slave.
He said, "Yes, if she is his wife."

Chapter on the *'idda*

- §137 I heard Ahmad say, "Divorce is in accordance with the status of men and *'idda* in accordance with the status of women, because men are the ones who carry out the divorce, and women are the ones who wait the period of the *'idda*."

Chapter on the Married Female Slave

- §138 Abū Dāwūd said: I heard Ahmad asked whether a female slave who is sold and who has a husband remains married to him.
He said, "Yes."

I said to Ahmad, "Is the *ḥadīth* of Barīra proof (*ḥujja*) of this?"

He said, "How can it be, since Ibn 'Abbās related it, and he holds that her sale was her divorce? Ibn Mas'ūd also said [that a female slave's sale was] her divorce, but I think that Ibn Mas'ūd did not know Barīra's story. Who knows whether this *āya* which concerns [the battle of] Auṭās was revealed before or after the case of Barīra? There is no proof in the *āya* [of anything concerning her]."

- §139 I heard Ahmad say, "Abū Sa'īd used to say this *āya* was revealed with regard to those captured at Auṭās. Ibn Mas'ūd said it was revealed concerning Muslims and unbelievers."

- §140 I heard Ahmad asked about a man who buys a female slave who tells him she has a husband.
He said, "She is forbidden (*ḥarām*) to him."

- §141 I heard Aḥmad say, "If a slave gets married with his master's permission, the divorce is in the hands of the slave."

Chapter on Truthfulness regarding Menstruation

- §142 Abū Dāwūd said: I heard Aḥmad asked about a man who says to one of his wives, "When you menstruate, you are divorced" [and says of another wife,] "and she is divorced with you." Then the first wife says, "I am menstruating," either the minute she starts or a bit later.

He said, "The first wife is divorced; the other wife is not, until she is informed directly. The first wife is believed about herself, but he cannot make the divorce of another wife her responsibility."

Chapter on the Disagreement of a Couple concerning Household Goods

- §143 Abū Dāwūd said: I heard Aḥmad asked about a husband and wife who disagree about the ownership of household goods.

He said, "What is obviously women's clothing belongs to the wife and what is obviously men's clothing to the husband. Then each takes an oath about what he or she owns of the rest of their household goods."

Abū Dāwūd said: *What if there is doubt about the truthfulness of their oaths?

Aḥmad said, "Then the rest of their household goods are divided up into equal halves."¹⁰ m23

Someone said to him, "What if the husband is a slave?"

Aḥmad said, "The same [procedure is followed], whether he is a slave or free."

Chapter on the Divorce of the Man Who Is Ill

- §144 I heard Aḥmad asked about a man who divorces his wife while ill, then recovers his health, and then dies.

He said, "She does not inherit from him. [Something] has been related about this on the authority of 'Ubaī b. Ka'b. He

¹⁰ Although these few lines are corrupt, the meaning is clear. See parallels in Russell and Suhrawardy, pp. 100–101.

said, 'I continue to have her inherit from him until she remarries, or he recovers.'"

- §145 I heard Aḥmad when someone said to him, "If a man divorces his wife singly before having intercourse with her and then dies, does she inherit from him?"

He said, "No."

- §146 I heard Aḥmad asked, "If a healthy man says to his wife, 'You are divorced when the next month begins,' and then he falls ill at the beginning of the next month and dies while she is in her *'idda*, does his wife inherit from him?"

Aḥmad said, "Yes, whenever the divorce occurs while the husband is [terminally] ill, his wife inherits from him."

- §147 Someone said to Aḥmad, "Suppose a man says to his wife, 'You are divorced at the noon prayer,' then the time of the noon prayer arrives, and he dies."

He said, "If he was ill when it became time for the noon prayer, she inherits from him; a man may die suddenly."

- §148 I heard Aḥmad say, "If a healthy husband says to his wife, 'When a certain person approaches, you are divorced,' and that person approaches while the husband is ill, and then the husband dies, his wife inherits from him, because the divorce occurred when he was ill."

- §149 I heard Aḥmad say, "If a woman frees herself by means of *khul'* while her husband is ill, some say she does not inherit from him, because the divorce originated with her."

Chapter on Breaking an Oath concerning Intercourse

- §150 Abū Dāwūd said: I heard Aḥmad asked about a man who says to his wife, "If I have intercourse with you, you are triply divorced," or says to his female slave, "If I have intercourse with you, you are free," and then he remembers [what he said] during intercourse, so he withdraws from her (i.e., from either woman).

He said, "He has broken his oath."

Chapter on a Jewish Woman Converting to Islam

- §151 Abū Dāwūd said: I heard Aḥmad, when someone said to him, "What happens when the wife of a Jewish couple converts to Islam?"

He said, "They are separated."

Someone said to Ahmad, pp. "[What if] there is no one to separate them, so the wife withdraws from her husband and completes an *'idda* [on her own], may she [re]marry?"

He said, "There is disagreement about this matter."

Chapter on Breaking an Oath concerning Traveling and Similar Matters

- §152 Abū Dāwūd said: I heard Ahmad asked about a man who says, "If I do not leave Baghdad, my wife is divorced."

He said, "The matter is decided in accordance with how soon or how late he leaves. If he meant in five days and goes away in a month, I am afraid that he breaks his oath."

Someone said to Ahmad while I was listening, "Then it is not permissible for him to have intercourse with his wife?"

He said, "Yes [it is. That is], within the time period that he intended."

Chapter on the *'Idda* of the Divorcée

- §153 I heard Ahmad say, "[The *'idda* of the widow] was made four months and ten days, [because] they claim that the spirit is breathed into it (i.e., the fetus) in ten days."²⁴
- §154 I heard Ahmad say, "The divorcée waits an *'idda* of three menstrual periods. However, if she does not menstruate, then three months."
- §155 I heard Ahmad say, "If a woman is waiting an *'idda* in terms of months, then menstruates before completing three months, she must resume her *'idda* [and count it in terms of menstrual periods]."
- §156 I heard Ahmad say, "The widow, the triply divorced woman, and the female pilgrim should all eschew perfume and ornamentation."

²⁴ Ibn Hanbal offers a reason here for the ten days' addition to the widow's *'idda*. The four-month period is based on the idea of the "ensoulment" of the fetus after 120 days. See Musallam, pp. 40–42, 56–59. In this response, Ibn Hanbal says that the spirit (*rūh*) is breathed into the fetus during the first ten days after the end of the fourth month. See Ibn Hanbal, *Musnad*, 1:382, for a tradition about the stages of the creation of a human being. See Abū Dāwūd, *Sunan*, 4:178, for another example of the same tradition. See also Tabarī, *Jāmi'*, 5:92, for his commentary on Qur'an 2:234. Tabarī offers two traditions that support Ibn Hanbal's statement.

- §157 I heard Ahmad say [something] about the woman waiting an *'idda* who stops menstruating owing to illness or nursing.

I heard him say, "The woman who stops menstruating owing to illness or nursing waits an *'idda* counted in terms of menstrual periods, because she will start again. As for the woman who stops menstruating and does not know why, she waits an *'idda* of one year: nine months for pregnancy and three months for the *'idda* [of a woman who does not menstruate]."

Ahmad said, "The woman about whom 'Uthmān consulted 'Alī was nursing. Waki' said concerning the *ḥadīth* of Ibn Mas'ūd, 'Allāh has kept her inheritance for you—she was ill.' I have heard this statement only on the authority of Waki', but the *ḥadīth* of others [says], 'She was nursing.'"²⁵

- §158 I heard Ahmad asked whether a divorcée's husband who still has the option of returning to her should see her hair. He found this idea reprehensible (*karihahu*).²⁶

Chapter on a Woman's Leaving Her House during Her *'Idda*

- §159 Abū Dāwūd said: I heard Ahmad say, "The triply divorced woman leaves the house [of her husband] to protect her reputation. The Prophet said to Fāṭima bt. Qais, 'She should not be

²⁵ Ibn Hanbal mentions two traditions that address the problem of an *'idda* that goes on longer than a year (because it is not known why the wife's menstrual periods have stopped) and is ended only by the death of one of the spouses. Since, in both cases, the woman is waiting an *'idda* after a nonfinal divorce, the couple inherit from each other if either dies before her *'idda* is ended. The first deals with nursing and the death of the husband; the second, with illness and the death of the wife.

In the first, Ibn Hanbal refers to a story about the Companion Ḥabbān b. Munqidh, who divorced his wife singly while she was nursing (and therefore not menstruating). Then Ḥabbān fell ill and went to ask 'Uthmān whether his wife would inherit from him if he died. 'Uthmān turned to 'Alī and Zaid b. Thābit, who were present, and asked their opinion. They said she would. See Ibn Qudāma, 9:99.

In the second, 'Alqama divorced his wife singly, after which she menstruated once or twice and then not again for eighteen months. Then she died, at which point Ibn Mas'ūd said to 'Alqama, "Allāh has kept her inheritance for you. . . ." See Malik, *Muwatta' al-Shaibānī*, pp. 246–247. Ibn Hanbal brings up Waki's alternate wording here, and in AA 133. In IK 146, he incorporates it into his answer.

²⁶ In the *Mudawwana*, it is reported that Malik initially saw no harm in a man's seeing his wife during her *'idda* (as long as someone else was also with her). However, then he reversed himself and said a man should neither be in his wife's presence, nor see her hair, nor eat with her until he had actually returned to her. Shāfi'i says all these things are not allowed the husband until he has returned to his wife. See Malik, *Mudawwana*, 2:424 and Shāfi'i, *Umm*, 5:241–242.

with a man in the house.' But the revocably divorced woman does not leave her house."

§160 I said to Ahmad, "Do you follow (*tadhhabu ilā*) the *ḥadīth* of Fāṭima bt. Qais whose husband divorced her?"

He said, "Yes." Then a man quoted him 'Umar's saying, "We do not forsake the Book of our Lord and the *sunna* of our Prophet."

Then he said, "What does this refer to in the Book of our Lord?"

The man said, "Lodge them where ye dwell (65:6)."

Ahmad said, "This statement applies to the woman who has been revocably divorced."

Abū Dāwūd said: I said, "Is this statement on the authority of 'Umar sound (*yaṣihhu*)?"

He said, "No."

§161 I heard Ahmad say, "A man who has divorced his wife but still has the right to return to her should not expel her from the house in which he divorced her, unless she has done something which calls for a *ḥadd* punishment. If she has, then she is expelled from her house and proceedings undertaken against her."

§162 I heard Ahmad b. Hanbal asked about the widow who is being given lodging [in her husband's house during her *'idda* and whom] they wish (e.g., creditors of her late husband, or the owners of the house) to expel.

He said, "What has she done?" Or he said, "What is [there] against her?"

§163 I said to Ahmad, "[What about] the widow?"

He said, "She does not go out."

I said, "During the day?"

He said, "Yes, but she should not spend the night away from home."

I said, "Part of the night?"

He said, "She should spend most of the night at home."

Chapter on *Aqrā'*

§164 Abū Dāwūd said: Someone said to Ahmad while I was listening, "What is your view on the meaning of *aqrā'*? Are they periods of purity?"

He said, "I used to think so, but now I am not certain (*ata-*

hayyab), because there are *ḥadīths* about this on the authority of 'Alī and 'Abd Allāh b. Mas'ūd."

§165 I said, "'Ā'isha's *ḥadīth* on this question is proof (*hujja*): she would omit prayer on the days of her *aqrā'*."

He said, "'Ā'isha considered *aqrā'* periods of purity. That is a mixed *matn* (*ḥādthā kalām mukhtalū*). But Ibn 'Umar's doctrine is that men should divorce their wives purely—without having had intercourse with them [since their previous menstrual period]." He [Ibn 'Umar] said, "That is the *'idda* by which Allāh ordered women to be [effectively] divorced,"²¹ and this is proof (i.e., not 'Ā'isha's *ḥadīth*) for those who say that as soon as her third menstrual period starts, a wife is free of her husband."²²

Chapter on the *'Idda* of the *Umm al-Walad*

§166 I heard Ahmad, when he was asked about the *'idda* of the *umm al-walad*, say, "Ibn 'Umar said it is one menstrual period, but I avoid saying anything about it."

Chapter on Believing a Woman about the End of Her *'Idda*

§167 Abū Dāwūd said: I heard Ahmad b. Hanbal²³ say, "If she, that is, a divorced woman, claims that her *'idda* has ended once more than a month has passed, as far as I am concerned, she should be believed."

[He was asked, "What about] when she claims that her *'idda* has ended and one month [only] has passed."

He said, "If she proves it, then yes [it has ended]."

§168 I heard Ahmad say, "Proof for a woman that her *'idda* has ended in a month only would be that she had been seen praying and fasting. But otherwise, no. [Proof of its end] would require examination of her body."

§169 I heard Ahmad when someone said to him, "[What] if a man divorces his wife, and she claims that her *'idda* is over, and she then delivers a child more than six months later?"

²¹See Wensinck, *Concordance*, s.v. "*qur'*" for traditions on whether the word means "menstrual period," or "the time between menstrual periods." Many traditions support each meaning. Some of each are on the authority of 'Ā'isha. Ibn Hanbal supports those that have her say *qur'* refers to the time between menstrual periods.

He said, "The child is not her [former] husband's."

I said, "What if she gives birth in less than six months after the day he divorced her?"

He said, "Then the child is her [former] husband's."

Chapter on Giving in Marriage during the *ʿIdda*

- §170 Abū Dāwūd said: I heard Ahmad asked about a man who marries a woman in her *ʿidda*, not knowing [she is still in her *ʿidda*]."

He said, "They are separated, but if he has had intercourse with her, she receives a dower."

I said, "Does she wait the rest of her *ʿidda* on behalf of her first husband?"

He said, "[Yes], on behalf of her first husband, then a new *ʿidda* on behalf of the second husband. But if she is pregnant, her delivery ends her *ʿidda* on behalf of her second husband, and then she completes her *ʿidda* on behalf of the first. If he has not had intercourse with her, that is, the second husband, there is no dower and no *ʿidda*."

Chapter on the Longest Time a Woman Remains Pregnant

- §171 Abū Dāwūd said: I mentioned Ibn ʿAjlān's *ḥadīth* to Ahmad—that his wife had been pregnant for five years.

He said, "Five years I have not heard of, but four, [yes]. The Madinese follow this because of ʿUmar's doctrine that the time limit for the *maḥqūd* is four years.

- §172 I heard Ahmad b. Hanbal say, "Al-Ḍabbāk b. Muzāḥim was born with two central incisors."²⁸

- §173 I heard Ahmad say, "There is semen for forty [days], then a clot of blood for [another] forty, then an embryo for [a third] forty."

He said, "Then when it . . . " into the fourth [stage of] creation, it becomes a created being."²⁹

²⁸For minimum and maximum periods of gestation, which are of importance for considerations of paternity and inheritance, see Coulson, pp. 23–24.

²⁹See Musallam, pp. 53–59, for stages of fetal development. After four months, a fetus is considered a human being with a soul.

He said, "By [the act of giving birth to] it, the female slave becomes free (i.e., an *umm al-walad*), and the *ʿidda* (i.e., of any woman) comes to an end."

Chapter on Who Has the Right to Custody of a Child"

- §174 Abū Dāwūd said: I heard Ahmad b. Hanbal say, "A boy is given the choice [of deciding who should have the right to his custody] when he is six or seven years old."

I said, "And a girl?"

He said, "A father has the right to custody of his daughter, because he gives in marriage girls of this age (*mithlahā*)."

Chapter on [Procedure for a Man's] Returning [to His Wife]

- §175 Abū Dāwūd said: I heard Ahmad b. Hanbal asked how a man returns to his wife.

He said, "[In order to return to his wife], a man has two other men as witnesses when he says, 'I am returning to Fulāna bt. Fulān.'"

Someone said, "Even if the woman is not present?"

He said, "Yes."

Chapter on *Tahḥīl*

- §176 Abū Dāwūd said: I heard Ahmad b. Muḥammad b. Hanbal asked about a minor youth (*ghulām*) who marries and has intercourse [with his wife. He was asked whether] she can lawfully remarry her first husband.

He said, "Yes."

I heard Ahmad asked about a eunuch who marries and has intercourse with his wife. [He was asked whether] he (i.e., the eunuch) makes her lawful [for her first husband].

He said, "No, a eunuch does not complete the sexual act."³⁰

- §177 I heard Ahmad asked about a man who divorces his wife, but

³⁰Mālik disagrees and considers both the marriage and the divorce of the eunuch valid. See *Mudawwana*, 2:198–199.

not triply, and whose wife then marries another husband and then returns to her first husband. [He was asked,] "How many divorces does their marriage have behind it?"

He said, "[One or two divorces,] depending on how many remain."



CHAPTER 3

Compilation of

‘Abd Allāh b. Aḥmad b. Ḥanbal

The Book of Marriage

[What Happens When] a Man Marries a Woman
without a *Walī* and Who Gives a Woman in
Marriage When She Has No *Walī*

- §1 ‘Abd Allāh said, "I heard my father say, about a man who marries a woman without a *walī*, in the presence only of witnesses, "That is not valid (*lā yaḥḍu*)."
- §2 Someone said to my father while I was listening, "Does the governor (*amīr*) or the judge (*qāḍī*) have the most right to give [a woman] in marriage?"
- He said, "The judge, because he is in charge of sexual relations and legal judgments."
- §3 I asked my father about a woman who entrusts her matter to a Muslim man who thereby gives her in marriage. But she has brothers and agnates.
- He said, "The marriage contract is concluded over again by her brothers or agnates."
- §4 I asked my father about a man who is one of the witnesses to a woman's marriage. Then later [after a certain period of time] the woman comes to him and says, "My husband has divorced me and my *‘idda* is over." Can the witness accept what she says and marry her [himself]?
- My father said, "If he acted as a witness to her marriage with a *walī* and [other] witnesses present, then she comes and says, 'My husband divorced me,' he should inquire about her hus-

band's divorcing her. Then if he can be certain that her husband has divorced her and that with regard to what she has claimed about the end of her *ʿidda* she is telling the truth, [he can marry her]. If, however, he turns out to be her nearest *wali*, in order to marry her he must arrange to have another man act as her *wali* and give her in marriage to him in the presence of witnesses. Further, he must award her a fair dower."

§5 I asked my father about a secret marriage. "Do you think it is a [valid] marriage contract? If there are two witnesses and a *wali*, is it secret?"

He said, "It is preferable (*yustahabbu*) that a marriage be made public and not be secret, that it be with a *wali*, and that musical instruments (*duff*) be played at it, so that it becomes well known and acknowledged."

§6 I asked my father about a man who is a woman's *wali*, and puts her matter into the hands of a second man, and the second man uses that authority (*wilāya*) to marry her himself with the woman's consent. Then the marriage takes place. "Do you consider this marriage valid (*ṣaḥiḥ*)?"

My father said, "As long as he really was her nearest *wali* and there was no one nearer than he, and he gave his authority as her guardian to a second man who married her with her consent, the marriage is valid."

I said, "What if¹ there was a *wali* nearer than he?"

He said, "Then the nearest *wali* has the right to give her in marriage with her consent."¹

§7 [My father said,] "There is no disagreement about the *ṭhayyib*: she is given in marriage only with her permission."

I said to my father, "What about the *bikr*?"

He said, "There are those who disagree concerning the matter [of the *bikr*]."

I said, "What do you prefer?"

He said, "Her *wali* should consult her. Then if she grants permission, he can give her in marriage."

I said, "But if she does not grant it?"

¹But see Ibn Rāḥwayh's opinion below (IK 17) and Mālik, *Mudawwana*, 2:171-172, for the opinion that if two of a woman's potential *walis* give her in marriage, the first marriage contract concluded is upheld, even if it was not concluded by her nearest *wali*. For a tradition on the authority of the Prophet to this effect, see Abū Dāwūd, *Sunan*, 2:182, and Ibn Hanbal, *Musnad*, 5:11. See IK 13 and 15 for possible solutions if it cannot be ascertained which marriage contract came first.

He said, "If her father is [her *wali*], and she has not reached seven years of age, then her father's giving her in marriage is valid, and she has no option. But if she has reached her ninth year, neither her father nor anyone else should give her in marriage without her permission. [As for] the orphan who has not reached nine years of age, if someone other than her father is giving her in marriage, I do not like him to do so until she reaches nine years of age. When she is nine, she should be consulted. Then if she grants her permission, she has no option thereafter."

§8 I asked my father about a woman who gives herself in marriage to a man, in the presence of two witnesses during a period in which her *wali* is absent. Then her *wali* writes that what she has done for herself is valid. "Is that permissible (*hal yaṣluḥu dhālika*)?"

He said, "The marriage contract should be concluded again."

§9 I asked him about a woman who orders a certain man to give her daughter in marriage, and he does so.

He said, "The marriage contract should be concluded again."

I said, "[What if] the girl is five years old?"

He said, "I do not approve of such a marriage. Only her father gives an underage girl in marriage; when he does so, the marriage is valid. Only her father should give a girl in marriage, until she reaches nine years of age and can be consulted about herself. Then, if she gives her permission, her agnates may give her in marriage: her brother, her paternal uncle, his son. But if she has no agnates, then the judge (*qāḍī*) [gives her in marriage]."

I said to my father, "But if her agnates refuse to give her in marriage?"

He said, "They should not do that. [But if they do,] she brings her situation to the [attention] of the judge."

The Orphan Is Consulted about Herself

§10 I asked my father about a minor girl who has neither a father nor a brother, but who does have a closely related paternal cousin. He goes on a pilgrimage, and while he is away, her father's paternal cousin gives her in marriage to an underage youth whose father has accepted the marriage on his behalf. Then her own paternal cousin returns from the pilgrimage and neither validates the marriage nor declares it invalid. "What do

you think about this marriage? Is it valid or not? And does this young girl, when she comes of age, have an option or not?"

My father dictated to me, and he said, "The orphan is not given in marriage until she has reached nine years of age; then, when she is nine years old, she should be consulted. If she grants permission, later on, she has no option [to turn down the marriage]. If they want to make this particular girl's marriage valid, she should be left until she reaches the age of nine, and then she should be consulted. Her closely related paternal cousin has more right to give her in marriage than a more distant agnate. Her *wali* can give her in marriage when she has reached nine years of age, but at that age she has the option [to turn down the marriage]."

§11 I asked my father about a man who fornicates with a daughter of his wife's.

He said, "His wife is not thereby forbidden to him, but he does not have sexual intercourse with her until the 'idda of the daughter with whom he has fornicated has ended."²

§12 I asked my father about a girl who is given in marriage by her father when she is a minor and then marries another husband when she comes of age.

He said, "The couple are separated, and she is returned to the husband to whom her father gave her in marriage."

I said to my father, "What if the second husband has had intercourse with her?"

He said, "She receives a compensatory dower."

I said to my father, "Suppose she has had a child by him?"

He said, "The child belongs to him, but she is returned to her first husband."

§13 I asked my father about a man who says to another, "Give me in marriage to your daughter." Then he does so, without witnesses or proof, but [in this case] her *wali* is her father.

My father said, "I prefer that a marriage be witnessed."

I said to my father, "If it is not witnessed, do you think it is invalid (*harām*)?"

He said, "I prefer that it be witnessed."

²Ibn Hanbal's answer here is contrary to all his other statements on this kind of question—one about a situation in which a woman becomes a man's mother by marriage. See Shāwīsh's note to #1188, p. 322 of his edition of the *masā'il*, and AA 23. However, it does fit in with Mālik's view, and Shāfi'is, that unlawful sexual relations do not forbid lawful ones.

§14 My father related to me and said, "Hushaim related to us, he said, 'Husain informed us on the authority of Abū Bakr b. 'Abd Allāh who said, "'Umar b. al-Khaṭṭāb wrote to the *amṣār* [that] any woman who marries her slave or marries without proof (*bayyina*) [provided by witnesses] and without a *wali* should be beaten, and she and her spouse separated.'"

[My father continued,] "Hudya b. Khālid related to us: he said, 'Hammād b. Zaid related to us on the authority of 'Amr b. Dīnār: he said, "A woman got married without a *wali*, and 'Umar refused [to accept the validity of] her marriage.'"

§15 I asked my father about the *ḥadīth* of Maimūna bt. al-Hārith, who put her matter into al-'Abbās's hands, and then al-'Abbās gave her in marriage to the Prophet. "Is this *ḥadīth* sound?"

My father said, "Shu'ba said [that] al-Hakam heard only four *ḥadīths* on the authority of Miqṣam, and this was not among them." My father said, "This *ḥadīth* has no basis."⁴

What Happens If a Maternal Uncle Gives [His Niece] in Marriage

§16 I asked my father about a minor girl given in marriage by her maternal uncle. After her husband has had intercourse with her, the couple are informed the marriage is improper (*fāsid*), and they are separated. "Is the girl due a dower? Is it lawful for the judicial authority (*sultān*) to give permission for her to be given in marriage to this [young] man when she has matured, or reached fifteen years of age? Or does he write to her *walis* wherever they are? At what point⁵ is she of age if she does not menstruate? Is it lawful for her, once she has matured, or reached the [usual] age of maturity to give her maternal uncle permission to give her in marriage, if she has no other *wali*? If the couple are separated, does she wait an 'idda? If so, [for how] long?"

⁴For several stories of 'Umar's disapproval of marriages improperly witnessed or concluded without a *wali*, see Mālik, *Muwatta'*, 3:144, and Shāfi'i, 5:19.

A woman cannot manumit a slave on the condition that he marry her. For a discussion of free women marrying slaves, see Ibn Qudāma, 7:403–426.

⁵See Ahmad Ibn Hanbal, *Kutub al-'ilal*, wa ma'rifa al-rijāl, #1187, for a repeat of the statement that al-Hakam heard only four traditions on the authority of Miqṣam (a client of either Ibn 'Abbās or 'Abd Allāh b. Hārith).

Al-'Abbās, Maimūna's brother-in-law, acted as her *wali* and gave her in marriage to the Prophet. See Ibn Sa'd, 8:94.

My father dictated to me, and he said, "If her husband has had intercourse with her, and if her maternal uncle has placed her in a situation of having a husband who is her peer, and if she has been given the full dower, then what I should like [to see done] in this [situation] is that her marriage contract be concluded again by an agnate *wali* and that she receive a dower on the basis of there having been intercourse when they conclude the marriage contract again and [decide on] a new dower.

"The point at which a girl comes of age is at the onset of menstruation, which we have called her coming of age due to menstruation.

"If she has no agnate *wali* present, her agnates should be written to, so they can give permission for her to be given in marriage, unless they are so far away, it is too hard to get in touch with them. What we have heard is that a marriage contract is concluded by a *wali*. If there is no *wali*, the judge (*sulṭān*) is the *wali* of the woman who has no other.

"A minor girl is given in marriage only by her father. Once she has reached nine years of age and can have a *wali* other than her father, she should be consulted. If she gives her consent, it is lawful for her *wali* to give her in marriage.

"If the couple are separated, she must wait an *ʿidda*. [Regardless of] whether they are separated because the marriage is invalid, or it is not invalid—so they [are separated because they] are divorced, or they are separated for another reason, such as foster-relationship—she waits the *ʿidda* of the divorcee. If she menstruates, her *ʿidda* is three menstrual periods; if she does not, three months.

"Proof that a girl should be consulted when she has reached nine years of age is what is transmitted about the Prophet; that he had intercourse with ʿĀʾisha when she had reached nine years of age."

When Maintenance Is Due a Woman

- §17 I heard my father say, "If a man marries a woman who withholds herself from him,⁶ she does not receive maintenance. If, however, he withholds himself from her, then he must give her maintenance. If he marries her when she is a minor, she does not receive maintenance until she is nine years of age. This is the age at which she may engage in sexual relations, because the Prophet had intercourse with ʿĀʾisha when she was nine.

"If a girl is an orphan, then gives permission for her marriage, she has no further option. But she should not be given in marriage until she is consulted."

If a Father Gives His Underage Daughter in Marriage, Can She Opt?⁴

- §18 I asked my father about a man who gives his underage daughter in marriage. "Can she opt [to turn down the marriage] when she is of age?"

He said, "She cannot exercise this option if her father gave her in marriage. If she could, then ʿĀʾisha could have with regard to the Prophet, because the Prophet married her when she was six or seven years old, had intercourse with her when she was nine, and died when she was eighteen."

- §19 I asked my father about a man who gives his mature daughter in marriage without her consent. "Is the marriage valid (*yathbutu*)?"

He said, "There is disagreement on this question. I prefer that he consult her, and if she is silent, that is her consent. [However], the Madinese say her father can give her in marriage without consulting her."

- §20 I heard my father asked about a man who gives his minor son in marriage. [He was asked] whose responsibility the dower is.

He said, "The father's, if he accepts the responsibility. If he does not, the son is responsible for it."

Someone said to my father, "But the son in this case is a minor!"

He said, "I do not like it; a father should not conclude such a marriage."

- §21 I asked my father about a woman who frees her husband from the obligation of her dower, except for a pilgrimage he is to undertake on her behalf. Then she changes her mind.

He said, "She can change her mind about her dower."

Giving the *Bikr* and the *Thayyib* in Marriage with Their Consent

- §22 I heard my father say, "There is no disagreement about the *thayyib*. She is given in marriage only with her permission."

I said to my father, "What about the *bikr*?"

He said, "There are those who disagree about her."

I said to my father, "What do you prefer?"

He said, "That her *walī* consult her. Then if she gives her permission, he gives her in marriage."

I said, "What if she does not give her permission?"

He said, "If her father is alive, and she is under nine years of age, her father's giving her in marriage is valid, and she has no option. But once she has reached nine years of age, neither her father nor anyone else can give her in marriage without her permission. And [with regard to] the orphan who is not nine, if someone other than her father is to give her in marriage, I do not like him to do so until she has reached nine years of age. Once she is nine, she must be consulted. Then when she gives her permission,⁶ she has no option."

[Concerning] the Man Who Has Intercourse
with His Mother-in-Law

§23 I asked my father about a man who has intercourse with his mother-in-law.

He said, "That man is separated from his wife."

I asked my father about a man who commits fornication with a woman. Can he lawfully marry her daughter?

He said, "No, he cannot. 'Imrān b. al-Ḥusain said, 'If a man commits fornication with his mother-in-law, both are forbidden to him'; or, he said that the man's wife is."

My father said, "Either of these cases amounts to the same thing, because Allāh said: *And your mothers-in-law, and your step-daughters who are under your protection (born) of your women unto whom ye have gone in—but if ye have not yet gone in unto them, then it is no sin for you (to marry their daughters)* (4:23). In this matter, I follow the doctrine of 'Imrān b. al-Ḥusain. And the Madinese say, 'Whatever is forbidden does not forbid whatever is lawful.'"

I asked my father about a man who has intercourse with his mother-in-law. "Is his wife forbidden to him?"

He said, "The man is separated from his wife."

[I asked,] "Regardless of whether he has done it out of forgetfulness?"

He said, "Yes. He is separated from her."

§24 I asked my father about a man who converted a woman to Islam and then married her.

He said, "There is disagreement among scholars [about this],

but I know of no disagreement among them concerning the judge (*sulṭān*). [He can give her in marriage.] The judicial authority is the *qāḍī*, because the *qāḍī* is in charge of sexual relations."⁵

When Is a Woman Due Her Dower?*

§25 I heard my father say, "Whoever marries in a *shighār* marriage, or marries a [second] woman in combination with her maternal or paternal aunt, is separated from his [unlawful] wife, and she receives a dower, if he has had intercourse with her. If he has not had intercourse with her, she receives nothing."

Someone said to my father, "What if he has been left alone with her and not touched her?"

He said, "If a door has been locked, or a curtain drawn, she receives a dower."

§26 I asked my father about a man who marries a woman and then is unable to have intercourse with her.

He said, "The couple are separated." [And] he said, "If a curtain has been drawn, or a door locked, a dower is due."

My father related to me and said, "Yahyā b. Sa'īd related to me and said, 'Qatāda related to us on the authority of al-Hasan on the authority of al-Aḥnaf on the authority of 'Umar and 'Alī: "Whoever locks a door or draws a curtain [creates a situation in which] a woman is due a dower and must wait an *'idda*.'"

My father related to me and said, "I read to 'Abd al-Rahmān b. Mālik on the authority of Yahyā b. Sa'īd on the authority of Sa'īd b. al-Musaiyab that 'Umar b. al-Khaṭṭāb decreed [the following] about a woman who has been given in marriage to a man: she is due a dower, if a curtain has been drawn."

My father related to me and said, "Ya'qūb related to us and said, 'My father related to us and said, "Muḥammad b. Ishāq al-Qurashī and Sufyān b. Sa'īd al-Thaurī related to me on the authority of Abū'l-Zinād on the authority of Sulaimān b. Yasar, who said, 'Al-Hārith b. al-Hakam married a woman of the Banū 'Āmir or Banū Murra. Then when she was brought to him, he went to her and took a nap with her, while she was

*See Mālik, *Mudawwana*, 2:164–165, where Ibn Qāsim reports that in Mālik's opinion, a man who has converted a woman to Islam can marry her himself.

either at Qubā' or at the 'Aqīq. But when he looked at her and found she was black, he left her and sent her a divorce without coming near her. Then Marwān [b. al-Hakam], who was governor of Madina, sent him to Zaid b. Thābit. Al-Hārith told Zaid [what had happened], and Zaid said the woman must receive a full dower and wait an *'idda* because of the time he had been alone with her. Then Marwān said that al-Hārith was above suspicion and that he had claimed he had^b undressed and taken a nap with her, but had not touched her at all. But Zaid said to him, "Give her her dower and order her to wait an *'idda*." He said (i.e., Sulaimān b. Yasar), "Then when Marwān pressed the point (i.e., that al-Hārith was above suspicion), Zaid said to him, "What would you think if she were to claim that he had had intercourse with her and that she was pregnant? What would you have done? Would you have instituted *li'an* between them?" Marwān said, "Yes," and Zaid said, "Give her her full dower and order her to wait an *'idda*."⁵

Ablutions (*Ghusl*) Are Required after Intercourse for the Minor Girl, As Well As for Jewish and Christian Women

§27 I asked my father about a man who has intercourse with his wife when she is a minor. "Should she perform an ablution?"

He said, "Yes, if intercourse has taken place, ablutions are required for women of all ages."

I asked my father about a man married to a Christian or a Jewish woman. "Should she perform an ablution? Should her husband make her do so?"

He said, "That is an excellent idea, but I have not heard anything on it."⁶

Marriage and Divorce of the Slave Man

§28 I heard my father asked how many [women] a slave could be married to [at the same time].

He said, "Two women."

⁵Marital relations are discussed in Ibn Qudāma, 8.

Someone said to my father, "Can a slave marry without the permission of his [master or] masters?"

He replied, "It is not permissible."

Someone said to my father while I was listening, "What if the master sanctions the marriage [after it has taken place]?"

He said, "[He does so] by means of a new contract."

Someone said to my father while I was listening, "Whose responsibility is the divorce, if his master has given a slave in marriage?"

He said, "The divorce is the slave's [own] responsibility."

I heard my father say about the slave, "When he divorces, his action is valid, because he has control over it. His master's divorcing [on his behalf] has no legal effect."

I heard my father say, "It is permissible for a slave to marry only with the permission of his master."

I heard my father asked, "If the slave marries without his master's permission and has intercourse with his wife, does she receive a dower?"

He said, "There is disagreement on this. 'Uthmān b. 'Affān says she gets two-fifths of it." My father said, "And I follow his opinion. Further, the dower is the slave's responsibility."⁷

A Woman Accepts Islam before Her Husband

§29 I asked my father about a woman who leaves Byzantium [and becomes] a Muslim.

He said, "There are those who say that her husband has the right to [consider himself married] to her as long as she is in her *'idda*, and there are others who say that since she has left [Byzantium], her relationship with her husband has been severed, and she has the right to [consider] herself [single]. Others allege the *hadith* of the Prophet that he returned his daughter to Abu'l-'Ās.

⁷See Ibn Qudāma, 7:410-411, where he points out that the dower can be considered like the payment for any felonious acts (*jināyāt*) committed by the slave, as part of the master's responsibilities of ownership. It cannot exceed the slave's value. Thus, if two-fifths of the woman's dower is more than the price of the slave, the master is liable for the price of the slave only.

In the section on felonies (*kitāb al-jināyāt*) in Malik's *Mudawwana*, 4:372, Ibn Qāsim reports that Mālik said if a slave seizes a free woman on his own responsibility, she receives a fair dower, which is the responsibility of the slave's master. The master may either hand over the slave as payment or redeem the slave with her fair dower.

Muhammad b. Ishāq transmitted on the authority of Dāwūd b. al-Ḥusain on the authority of 'Ikrima on the authority of Ibn 'Abbās that the Prophet returned her [to Abu'l-'Ās] on the basis of the first marriage. Some say after several years; others say after six years. A dower is not mentioned."

I heard my father say, "Hajjāj transmitted on the authority of 'Amr b. Shu'ayb on the authority of his father on the authority of his grandfather that the Prophet returned her to him on the basis of a new marriage."

Then my father said, "I am afraid to give an answer about this woman."⁸

- §30 I asked my father about a woman from non-Muslim territory (*harbiya*). "How long is her 'idda if she has accepted Islam and has a husband?"

He said, "She waits the 'idda of a free [Muslim] woman, because when she became a Muslim, the legal judgments of Islam became binding for her."

- §31 I asked my father about a man who commits fornication with a woman who as a result gives birth to a daughter. "When she grows up, is it permissible for the man to marry her?"

He said, "God forbid that a man marry his own daughter! This is an evil doctrine. The *ḥadīth* of al-Zuhri on the authority of 'Urwa on the authority of 'Ā'isha is that the Prophet said, 'Avoid him, Saudā.' This indicates that he had committed fornication with her. So the Prophet decreed that the child belongs to the marriage bed."⁹

- §32 I heard my father asked about a female slave who comes to a man and says, "My master has freed me." Then this man accepts what she says and marries her.

⁸The Prophet's daughter Zainab was married to her maternal cousin Abu'l-'Ās. After the battle of Badr, Zainab joined her father in Medina, and Abu'l-'Ās, still an unbeliever, remained behind in Mecca. At some point, he converted to Islam and was reunited with Zainab in Medina. The time lapse between the couple's separation and reunion is a moot point, as is the related question of whether they were remarried or reunited on the basis of their original marriage (see below, AA 29). See *Et*, s.v. "Zainab bt. Muhammad"; Guillaume, p. 317; Stern, p. 47. For a description of Ibn Hanbal's use of *isnads* in this problem, see Spectorsky, p. 464.

⁹A female slave of Saudā's father (Zama'a) bore a child whom Zama'a's son, 'Abd, claimed as a brother. However, Sa'd b. Abi Waqqās claimed it was his brother 'Utha's child. The Prophet awarded custody of the child to 'Abd but seems to have thought the child was really 'Utha's, since he would not allow Saudā to treat him as a brother. See Stern, p. 93, and Ibn Hanbal, *Musnad*, 6:37, 226.

He said, "He should not take her word for it, until he has his own proof that her master has freed her, or he asks her master himself, or she provides him with proof."

- §33 I asked my father about a Christian man whose wife becomes a Muslim.

He said, "He is offered a chance to become a Muslim, but if he does not, the couple are separated."

I said to my father, "What if he does become a Muslim?"

He said, "She remains his wife, unless the couple have been separated. If they have been separated, and the husband accepts Islam after the separation, he has the right to [return] to his wife, as long as she is still waiting her 'idda."

- §34 I asked my father about a critically ill man who decrees in a will that his *umm al-walad* is free, three days before he dies. Then he marries her in that time and makes her dower two hundred dirhams. But he does all this without witnesses to see her, to hear her speak, or to ask her whether she consents to the marriage, until he dies. [I said to my father that] one scholar (*ba'du ahl al-'ilm*) has stated that there can be no marriage without her consent and without witnesses, [and] he said that her consent after his death is not permissible.

My father said, "If this man fell ill and then freed his *umm al-walad*, it was incumbent upon him to consult her about marrying her. If he married her without her permission, then she has the right to [consider] herself [not married]. But if he married her with her permission, in the presence of witnesses, then the marriage contract is valid."

- §35 I asked my father about a man who has two wives, each of whom has a daughter. "Then one of the wives nurses a certain man. Is it lawful for this man's son to marry the daughter of the wife who did not nurse him?"

He said, "If a woman nurses a youth with her husband's milk she becomes the youth's mother and her husband becomes a father to him. Therefore, it is not lawful for the youth (i.e., the son of the man nursed by one of the wives) to marry her daughters or the daughters of her husband, since her husband has become a [grand]father to him."

- §36 I asked my father [about] a group who say the prohibition (*nahy*) of the Prophet is *adab*.

He said to me [by way of explaining this statement], "The Prophet forbade that a woman along with her aunts, maternal

or paternal, be wives of the same man. [Some] scholars did not know [what to do] and disagreed on whether a husband and a woman whom he marries, while he is married to her paternal or maternal aunt, should be separated."

[He continued,] "The Prophet forbade [eating] all predatory animals with eye teeth, as well as the flesh of donkeys, and [he also forbade] the spreading out of the hides of predatory animals."¹⁰

- §37 I heard my father say, "A slave should not see his mistress's hair." He considered that reprehensible.

My Father Was Asked about Men Not Having Sexual Desire

- §38 I asked my father about [the phrase] *men not having sexual desire* (24:31).

He said, "Abū Aḥmad al-Zubairī and Aswad b. ʿĀmir related to us on the authority of Abū Ishāq on the authority of whoever (*man*) related to him on the authority of Ibn ʿAbbās, concerning His words, *men not having sexual desire*. He (i.e., Ibn ʿAbbās) said, '[It means] those men in front of whom women need not be modest.'¹¹

- §39 I asked my father about a man who divorces his wife by uttering the divorce formula once, then a second time.

He said, "This man is legally divorced."

- §40 I heard my father asked about a pubescent youth who is enthralled¹ with a woman, or fancies her in a lustful manner typical of his age. "Is it lawful for him to have intercourse with her daughter?"

He said, "If he fancies her lustfully or he is pubescent, I prefer that he not have intercourse with her daughter."¹ He found that reprehensible.

¹⁰These two sentences seem misplaced here. *Adab* here means appropriate behavior, or good manners. The prohibition against eating predatory animals with eyeteeth is mentioned in several *ḥadīth* collections, as is that against spreading out their hides. See Wensinck, *Concordance*, s.v. *sabaʿ*, (plu. *sibāʿ*). However, these traditions are not in the chapters devoted to *adab* in the various *ḥadīth* collections. For typical *adab* topics, see, for example, Wensinck, *Handbook*, s.v. "Adab."

¹¹See Bell, *Commentary*, 1: pp. 599–600, for the notion that *men not having sexual desire* refers to old men. I have not used Pickthall here, but instead I translated the phrase in accordance with Bell's description of Baidāwī's interpretation of it. The phrase occurs in 24:31 in the context of those men in whose presence women need not be secluded.

- §41 I heard my father asked about a man who touches an immature girl lustfully.

He said, "It is not lawful for that man's son to have intercourse with the girl."

A Slave's Due and What Happens to a Female Slave If Her Slave Husband Dies

- §42 I asked my father, "What is a slave due?"

He said, "He should be fed, sheltered, and not asked to do anything he is unable to." Then he said, "When he matures, he should be given in marriage, but if he refuses [to marry], he should be left [alone]."

- §43 I asked my father about a man who says to his wife in Ramadan, "You are divorced if I do not have intercourse with you in Ramadan." Then he goes on a three-or-four-day journey, and then he has intercourse with her.

He said, "I do not approve of this, because it is a *ḥilla*, and I do not approve of *ḥilas* in this or in anything else."¹²

- §44 I asked my father about a man who gives one of his female slaves in marriage to one of his male slaves, and then the male slave dies.

He said, "She waits an *ʿidda* of two months and five days."

The Deaf-Mute Can Marry

- §45 I asked my father whether the deaf-mute can marry.

He said, "If he can understand and be understood and make gestures [to others about his intentions]. Likewise, he can divorce, buy and sell, and separate [from his wife]."

Is It Lawful for the Son of a Man Who Has Fornicated with a Woman to Marry That Woman?

- §46 I asked my father about a man who fornicates with a woman.

He said, "She is forbidden to his son, and if his son fornicates with her, she is forbidden to him."

¹²In accordance with this statement, divorce must occur in Ramadan when a husband would not have intercourse with his wife while fasting. However, the rules for fasting can be suspended for travelers, so if he goes on a journey of several days, he might not be fasting, and therefore intercourse with his wife would not be forbidden. The husband alters his status in relation to the month by going on a trip, so it is permissible for the rules of Ramadan not to apply to him. See *El*, s.v. "*Hilla*," and s.v. "Ramadan," AD 45 and 63 (n. 9).

I heard my father say, "If a man marries a woman, she is forbidden to his son, and if his son marries her, she is forbidden to him.

"If a man buys a female slave and then touches her, kisses her, or undresses her out of lust, she is forbidden to his son."

[Female] Slaves with Whom a Man Is Forbidden to Have Intercourse

§47 I heard my father say, "Among your slaves [the following] are forbidden to you: your female slave along with her daughter; your female slave along with her sister; your female slave if your father or son has had intercourse with her; your female slave when she is your paternal or maternal aunt through nursing; your Magian female slave; your female slave pregnant by another man; your female slave if she is married."

§48 I heard my father say, "If a man's female slave has committed fornication, he should not have intercourse with her until she has waited her *istibrā*, and he knows she has repented."

Chapter on Nursing^m and Other Questions

§49 I asked my father about a man who has a wife who nurses both a youth and a girl, and the youth has a brother. "Is it lawful for the brother to marry the girl?"

He said, "Yes, there is no harm in his marrying his brother's foster sister, because there is neither a foster- nor a blood relationship between them. Rather, the foster-relationship is between the first youth and the girl."

§50 I asked my father whether the word *mother* was to be understood in a general and in a specific sense (*yaḥtamil al-ʿumām waʾl-khuṣūs*).

He said, "Allāh said, *Marry not those women whom your fathers married, except what hath already happened (of that nature) in the past* (4:22). [That is,] what happened before the advent of Islam (*mā kāna fiʾl-jāhiliyya*). The outward meaning of the *āya* may be [that a man should not marry those women who were married to] his father, his grandfather, or his great-grandfather. Some scholars have said that this also applies to a man's maternal grandfather—he should not marry his mother's father's wife. Allāh's saying *those women whom your fathers married* means that it is not law-

ful for a son to marry any woman to whom his father has been married, even a woman [to whom his father has been married, but] with whom he has not had sexual intercourse."

My father related to me and said, "Husain b. Muḥammad related to us and said, 'Sharīk on the authority of Jābir on the authority of Abū Jaʿfar [who] said, "ʿAlī b. Abi Tālib placed Kaʿb b. ʿUjra between two rows of men (*al-samātain*), or he used the word *al-saffain*,¹³ [and] he said to him, 'Relate what you heard the Prophet say: "It is not lawful [for a man] to marry his brother's daughter, or his foster sister's daughter."'"

My father said, "This is what I say also. It is not lawful."

§51 I asked my father whether a man who marries should have intercourse with his wife before giving her any portion [of her dower].

He said, "Yes, there is no harm in his giving [it, first], or in his having intercourse with her [first]."

§52 I asked my father about a man who marries a slave" thinking she is free, and subsequently she bears him children. Then her master comes and proves she is a runaway slave of his.

He said, "Such a man must ransom his children and return the slave to her owner. Some scholars say the children must be ransomed slave for slave. But if a man has come to another and deceived him [about the status of a slave], with the result that the second man has married her," then the deceiver must ransom the children of the marriage."

I said to my father, "Then [what if] the man who claims the girl is his slave has no proof?"

He said, "Nothing happens until he proves it or she confirms she is his slave."

He [My Father] Was Asked about *Khulʿ*

§53 I asked my father about a man who is parted from his wife by means of *khulʿ*.

He said, "There is disagreement on it."

I said to my father, "What about a man who has a wife" who says [to him], 'Separate from me by means of *khulʿ* (*ikhlaʿ-nī*),' and he replies 'I do so (*qad khalaʿtuki*)?'"

¹³See Lane, *Lexicon*, s.v. "s m f," for *ṣūf* or "s f f" for *saff*. Either term means a row or rank of men. Each word is used to describe rows of believers lined up for prayer.

He said, "He may [re]marry her [after that] with a new marriage contract and a new dower, and the [new] marriage has two divorces behind it. On this there is no disagreement."

§54 I heard my father say, "*Khul'* may or may not be dependent on the wife's ransoming herself."

§55 I heard my father asked whether a man can divorce a wife from whom he has separated by *khul'* (*mukhtal'a*) during her *'idda*.

He said, "The divorce has no legal effect for her."

§56 I asked my father about *khul'*.

He said, "Habiba b. t. Sahl came to the Prophet and said, 'Thābit and I are incompatible.' The Prophet said, 'Return his garden to him.'" My father said, "It was as if she were giving up her dower, or ransoming herself from him with some of her assets."

§57 I said to my father, "Is *khul'* divorce?"

He replied, "There is disagreement on it. Ibn 'Abbās used to interpret this *āya*:

Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself. These are the limits (imposed by) Allah. Transgress them not. For whoso transgresseth Allah's limits: such are wrongdoers. And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. (2:229-230)

"Ibn 'Abbās said, 'Allāh mentioned divorce in the beginning, ransoming in the middle, and divorce after that. He holds that *khul'* is not divorce, but rather ransoming.'

"It has been related on the authority of 'Uthmān that he said, '*Khul'* is a divorce whatever it is called."

My father said [continuing], "Concerning 'Uthmān's *hadīth*, I do not know what its *isnād* is, Jumbān' on the authority of Umm Bakr." It seemed as if he were not pleased with its *isnād*.

I said to my father, "Do you follow Ibn 'Abbās's doctrine?"

He said, "There is disagreement about it." But it seemed to me as if he followed Ibn 'Abbās's doctrine.

§58 I asked my father about *khul'*. "Is it initiated by the wife or the husband?"

He said, "By the wife."

I said to my father, "If the husband dislikes his wife, can he say, 'I want to grant her her release?'"

He said, "No, how can that be? It is rather the wife who dislikes her husband, as in the case of Habiba bt. Sahl disliked Thābit b. Qais."¹⁴

My father said, "In accordance with Ibn 'Abbās's doctrine, if a woman is freed by means of *khul'*, it is not divorce, but ransoming. [Further,] Ibn 'Abbās used to say that the husband could [re]marry his former wife if he wished."

I saw my father adduce Ibn 'Abbās's doctrine and follow it (*uayarāhu*). He said, "*Khul'* is [a form of marital] separation, and it is not divorce. If the wife agrees with her husband about it (i.e., a marital separation), there is disagreement about whether that constitutes *khul'*."

§59 I asked my father about a woman who is separated from her husband by means of *khul'* and is pregnant. "Is she entitled to maintenance?"

He said, "No."

§60 My father related to me and said, "Muḥammad b. Ja'far related to us and said, 'Shu'ba related to us on the authority of 'Abd al-Malik b. Maisara on the authority of Tāwūs who said he was asked about *khul'* and said that it was nothing (i.e., did not count as a divorce). The questioner said, 'Will you continue to speak on something you know nothing about?' He [Tāwūs] said, 'By God, Ibn 'Abbās joined [in marriage] a Yemenite man and his wife after the Yemenite had [already] divorced her twice and [also] parted from her by means of *khul'*.'"

§61 I heard my father asked about a woman who nurses a young female slave belonging to someone else. Then a certain man marries the woman who has nursed the young female slave. "Is it lawful for the man to have intercourse with the female slave his wife has nursed if he buys and takes possession of her?"

He said, "He should not have intercourse with her." He found that reprehensible and said, "She is tantamount to her mother,

¹⁴Shāwīsh, in his note to this response (1248), identifies the woman as Jamila bt. 'Abd Allāh b. Ubayy. He refers to traditions about her separation from Thābit in both *Nasā'i's Sunan* and *Abū Dāwūd's*. Shāwīsh also notes that *Abū Dāwūd* reports her *'idda* as one month.

but let him make use of her [for other purposes] while she is his slave."

Someone said to him, "If the female slave comes to [be owned by] the woman [who nursed her], does that woman make use of her?"

He said, "She is her mother."

- §62 I asked my father about a man who manumits a female slave and makes her manumission her dower. Then he divorces her before having intercourse with her.

He said, "She is manumitted, and he claims from her one-half of her value [as a slave]."¹⁵

- §63 I asked my father about the deaf-mute. "Can he marry?"

He said, "If he can understand gesturing or understand what information he is being given about the marriage; likewise if he should wish to divorce."

I said to my father, "What if he does not know or understand [what is being communicated to him]?"

He said, "He cannot marry."

I said, "Can his *wali* give him in marriage?"

He said, "No."

I said, "Does he express himself through writing?"

He said, "[He expresses himself through signs, for example,] he points to the sky, that is what the deaf-mute does."

I asked my father about the deaf-mute's divorce.

He said, "If he is aware [of what he is doing] and can communicate through signs, then his divorce is valid."

He Was Asked about *Laban al-Fahl* and Nursing

- §64 I heard my father asked about *laban al-fahl*.

He said, "If a woman nurses a man's son and the son's female slave, the man cannot have intercourse with his son's female slave (i.e., because she has become his daughter)."

He said, "I also follow 'Ā'isha's *hadith*."¹⁶

- §65 I heard my father say, "I heard 'Abd al-Rahmān b. Mahdī say, 'It is incumbent upon you to instruct.' He said it twice. He meant in *fiqh*."

¹⁵She thereby receives half her dower as a gift for divorce before intercourse.

¹⁶See below, IK 80 and 91. 'Ā'isha's name is associated with traditions about how many acts of nursing create a foster-relationship.

- §66 I asked my father, "Do one or two acts of suckling establish foster-relationship (*yahrimu*)?"

He said, "I hesitate about this."

I said, "There are sound traditions [to this effect]."

He said, "Yes. But I do not allow it (i.e., the assumption of a foster-relationship) on the basis of them."

- §67 I heard my father say, "If an adult nurses, his nursing does not establish a foster-relationship (*lā yahrimu*); rather, it is simply eating."

- §68 My father related to me and said, "Yahyā b. Sa'īd related to us on the authority of Hishām, who said, 'My father informed me on the authority of Hajjāj on the authority of his father [who said], 'I said, 'O Messenger of Allāh, what will take away from me the debt of nursing?' He replied, 'A male or female slave.'""

I asked my father about [the meaning of] that [tradition].

He said, "It means that a man should give the woman who nursed his child the gift of a young slave, male or female. Then the debt of nursing will have been discharged."

Various Problems relating to Marriage"

- §69 I asked my father about a man who is a prisoner in a Christian land marrying there and then leaving (i.e., should he become free).

He said, "I find [the idea of] his leaving reprehensible; perhaps he has had children. I find his marrying or taking a concubine reprehensible, for the sake of his children."

- §70 I asked my father about a man who gives a minor son of his in marriage to another man's minor daughter and then the boy dies.

He said, "If the boy's father has guaranteed the dower on behalf of his son, he must give all of it to the girl's father. If he has not, nothing is incumbent upon him."

I said, "Suppose the boy had property or a house?"

He said, "The entire dower is taken out of it."

- §71 I asked my father about a group of people who give their daughters in marriage to a group [of Muslim men] on the understanding that the male offspring [of these marriages would all] be Muslim and the female [offspring] would be unbelievers, Jews, Christians, or Magians.

He said, "Any of the children [of these marriages] who refuse

Islam will be compelled to become Muslim, because their fathers are Muslim. The *ḥadīth* of the Prophet says, 'Their parents make them Jews or Christians. All of them (i.e., the children of these particular marriages) are returned to Islam.'¹⁷

- §72 I asked my father about a man who buys a female slave together with her mother, has intercourse with the daughter, and then manumits her. "Is it permissible for him to have intercourse with the mother?"

He considered that reprehensible and said, "Allāh said, *And the mothers of your wives* (4:23)."

- §73 I asked my father about *ṣihār*. "Is it the same in the case of a slave and a free woman?"

He said, "If the slave is the man's wife, whom he married for a dower, then *ṣihār* [is the same]. But if she is his property and an *umm al-walad*, then she cannot be repudiated by means of *ṣihār*." Another time he said [that if a man repudiates his slave or his *umm al-walad* by means of *ṣihār*,] he must expiate his oath.

- §74 I asked my father about a man who says to his wife, "You are forbidden to me" and intends [by this statement] a divorce.

He said, "Whatever his intention, it cannot be counted as a divorce, and he performs the expiation for [the oath of] *ṣihār*."

Someone said, "What if a man says, 'What is lawful to me is forbidden?'"

He said, "The same thing (i.e., such a man performs the expiation for *ṣihār*)."

Someone said, "This man did not intend divorce."

He said, "[The same thing happens] whether he intended divorce or not."

Someone said, "What if a man says, 'What is lawful to me is forbidden, I mean by that divorce?'"

He said, "His wife is triply divorced."

I said, "Triply?"

He said, "Yes, but I do not give a *fatwā* on this point."

He related to us and said, "Abū Bakr b. Abī Shaiba related to me, he said, 'Hātim b. Ismā'il related to us on the authority of Ja'far on the authority of his father on the authority of 'Alī,

¹⁷ See *El*, s.v. "Fitra." The word means "nature" or "natural disposition." It is used in the Qur'an (e.g., 30:30), but Ibn Hanbal here refers to a famous tradition in which the Prophet says that every child is born according to the *fitra* (i.e., as a Muslim), then his parents make him a Jew, a Christian, or a Magian. See Wensinck, *Concordance*, s.v. "fitra" for reference to different wordings of this *ḥadīth*.

[who] said, "If a man says to his wife, 'You are forbidden to me,' she is triply divorced.'"

He Was Asked about the Impotent Man*

- §75 I heard my father asked about a man when he has intercourse with his wife once.

He said, "He is not impotent, and the couple are not separated. I hold this opinion even if he does not have intercourse with her again, and she has no right to request him to."

My father related to me and said, "Wakīf related to us and said, 'Sufyān on the authority of al-Rakīn on the authority of his father and Ḥusain b. Qabīsa. They said, "'Abd Allāh [b. 'Umar] said, 'The impotent husband is given a year [in which to consummate his marriage]. If there is no intercourse [within that period], the couple are separated.'"

My father related to me and said, "'Abd al-Rahmān b. Sufyān related to us on the authority of al-Rakīn on the authority of Abū'l-Nu'mān, who said, 'We went to al-Mughīra b. Shu'ba about this, and he gave the impotent husband a term of one year.'"

My father related to me and said, "Yazīd related to us and said, 'Muhammad, that is, Ibn Ishāq informed us on the authority of Khālid b. Kathīr al-Hamdānī on the authority of al-Daḥḥāk b. Muzāhim that 'Alī gave the impotent husband a year. Then if he acts without shyness toward his wife, fine (*fasabila dhālika*). If not, the couple are separated. They have intercourse with each other by the grace of God.'"

My father related to me and said, "Yazīd related to us and said, 'Shu'ba informed us on the authority of Qatāda on the authority of Sa'īd b. al-Musaiyab that 'Umar b. al-Khaṭṭāb gave the impotent man a year, and he granted the wife a full dower and made her wait the period of a full 'idda.'"

He Was Asked about the *Mafqūd*

- §76 I asked my father about the *mafqūd*. "How long does [his wife] wait for him?"

[He said,] "For four years, four months, and ten days, then she may remarry. And the same is true with regard to his inheri-

tance (i.e., it is distributed after the waiting period for the *mafqud* has ended)."

- §77 My father said, "The [definition of a] *mafqud* is someone who is lost in war or at sea. Or he may be asleep in bed, but no one has seen him—that sort of thing."

I said to my father, "Then [what about] the man who is away from home and whose whereabouts are not known?"

He said, "This man is not considered a *mafqud*."¹⁸

- §78 I said to my father, "[What] if the *mafqud* returns and his wife has remarried and his property has been divided up?"

He said, "His property is returned to him, and he chooses between his wife and the dower [which he gave her]."

I said to my father, "If he chooses the dower, does he [her current husband] pay it?"¹⁹

He said, "Yes, but if he chooses his wife, she waits an *'idda* on behalf of her second husband, then she returns to him."

My father related to me and said, "Yahyā b. Sa'īd al-Qattān related to us and said, 'Abd al-Malik, that is, Ibn Abī Sulaimān related to us and said, 'Atā' related to me on the authority of 'Ubaid b. 'Umair that a man was missing during the time of the caliphate of 'Umar. The man's wife came to 'Umar and said, 'My husband is missing.' He said, 'Go and wait four years.' She did so and then returned to 'Umar, who said, 'Wait an *'idda* of four months and ten days.' She did so and then returned to 'Umar, who summoned the missing husband's *wali* and ordered him to divorce her. The *wali* did so, and then 'Umar said to the woman, 'Wait an *'idda* of three *qurū'*.' She did so and then returned to 'Umar, who said, 'Go marry whomever you wish.'"

"Then the missing husband returned, and 'Umar said to him, 'Woe to you! Where were you?' He said, 'O Commander of the Faithful, devils enchanted me and then carried me off, and I do not know where on God's earth they took me. I was enslaved by them until they were raided by, among others, Muslims, and I was part of their captured booty. They said, 'You are a human being, and they are *jinn*. What are you doing among them?' Then I told them my story, and they spoke [to me and asked] where on God's earth I would most like to be in the morning. I said in Madina, because it was my home. Then I woke up in the

morning, a free man.' 'Umar gave the man a choice between his [former] wife and the dower he had given her. He said, 'I have no further need of her; she is pregnant by her [new] husband.' So 'Umar ordered the dower [paid to him].'"

My father related to me and said, "Abd al-Razzāk related to us and said, 'Ma'mar on the authority of al-Zuhri on the authority of Ibn al-Musaiyab that 'Umar and 'Uthmān both decreed about the *mafqud* that his wife waits for four years and after that, four months and ten days. Then she may remarry. Then if her first husband returns, he is given the choice between his [former] wife and the dower [he gave her].'"

- §79 I heard my father asked about a minor girl whose father gives her in marriage to one man and whose brother gives her in marriage to another.

He said, "The contract concluded by the father is valid regardless of whether the girl was pleased. The father's contract is considered valid for the minor girl."

- §80 I asked my father about a man who has a female slave with whom he has intercourse. Then he wants to marry or take as a concubine her sister.

He said, "A man cannot have intercourse with two slave sisters at the same time."

I said to my father, "What if he gives the slave sister he owns in marriage to another man?"

My father said, "There is no harm in his giving her in marriage. If her body is forbidden to him, he can marry her sister."

Someone said to him, "What if he gives the original slave in marriage to another man, then marries her sister himself, and then the other man divorces the original slave and she comes back into his possession?"

He said, "He must rid himself of one of them."²⁰

- §81 I asked my father about a man who marries a woman while thinking to himself that he will divorce her.

He said, "I find this reprehensible. It is a *mu'a* [marriage]."

- §82 I heard my father asked about a man who buys a female slave and then wants to sell her immediately. "Is it permissible for him to sell her before her *istibrā'* is over?"

He said, "Whoever buys a female slave must not have intercourse with her until he has had her complete her period of *istibrā'*. Further, if he has had intercourse with her, he must not sell her until he has had her complete a period of *istibrā'*."

I asked my father about a female slave. "If a man has her

¹⁸See above, AD 116, 117. If a man is traveling, there is no reason to suppose that one should know his precise whereabouts.

¹⁹See above, AD 121, 122.

complete an *istibrāʾ* when she is young, before she has started menstruating, then has intercourse with her, then wants to sell her before she completes another *istibrāʾ*, how long should the *istibrāʾ* be, since she does not menstruate?"

He said, "It should be three months, because pregnancy does not become evident in fewer than three months."

§83 I heard my father asked about a man who has a female slave and marries her.

He said, "He must provide maintenance for her."

A Woman Claims of a Dead Man That He Was Her Husband

§84 I asked my father about a woman who claims⁸⁰ that a certain dead man was her husband, but she has no proof of her claim, because he and she had become separated for reasons not clear to her. "Is it permissible that she provide proof of her marriage contract and receive her inheritance [from him]?"

My father said, "If she can provide proof of her marriage contract with the dead man [and proof] that he married her with her *wali* [giving her in marriage] and witnesses [present], and that he was in sound mind and body, she is within her rights to [try to] find the husband, or his heirs, on the basis of that [marriage]."

§85 I asked my father about a man who claims that a certain dead woman is his wife and that a certain boy is his son by her. "Is it permissible that he provide proof of his marriage contract and that the boy is thereby his?"

My father said, "If he can provide proof that the woman's *wali* gave her in marriage to him in the presence of witnesses, then the [fact of] the marriage and the marriage bed is established and the boy is legally his, in accordance with the Prophet's doctrine 'The child belongs to the marriage bed.'⁸⁰ If the child resembles the man who has undertaken proof of the marriage, the boy was born to him."

⁸⁰"The child belongs to the marriage bed" (*al-walad li'l-frāsh*) is a legal maxim quoted as the basis for establishing paternal responsibility. For the numerous instances of this maxim in *ḥadīth* collections, see Wensinck, *Concordance*, s.v. "*frāsh*." In cases of contested paternity, physiognomists are consulted. Also see below, n. 24.

§86 I asked my father about the *ḥadīth* of Qabiṣa b. Harīth on the authority of Salama b. al-Mahīq al-Hudhālī on the authority of the Prophet [that says], "*al-bikr bi'l-bikr*."

He said, "They are two people who have never been married—neither the man nor the woman."

[I asked about the words in this *ḥadīth*, which are] "*Al-thayyib bi'l-thayyib*."

He said, "The *thayyib* is a man who has been married or a woman who has been married. They are both [called] '*thayyib*.'"

I said to my father, "What if the woman [only] is not a *thayyib*?"

He said, "She is flogged, but he is flogged and stoned. If they have both been married (*thayyib*), then they are both flogged and stoned."²¹

Chapter on a Man's Marriage to Another's Former Wife Along with His Daughter by a Different Woman

§87 I asked my father about a man who has a wife and then buys a female slave who, his wife says, used to belong to her father. "Is it lawful for this man to have intercourse with both of these women?"

My father said, "It is said that 'Abd Allāh b. Ja'far was married to a man's former wife and his daughter by another woman, at the same time. And the same is related about 'Abd Allāh b. Sa'f-wān, but al-Hasan and 'Ikrima found it reprehensible."

My father related to me and said, "I believe there is no harm in this practice."

My father related to me and said, "Yahyā b. Ādam related to us and said, 'Abū Bakr al-Nahshālī related to us on the authority of Mughīra on the authority of Qayyim, the *maulā* of Ja'far, who said, "'Abd Allāh b. Ja'far was married, at the same time, to Umm Kalthūm bt. 'Alī and Kahlā bt. Mas'ūd, the former wife of 'Alī al-Nahshālīya ([sic]).'"

My father related to me and said, "'Abd al-Razzāk related to us and said, 'Ma'mar related to us on the authority of al-Zuhri, who said, "'Abd Allāh b. Ja'far was married to a man's former wife and his daughter by another woman, at the same time.'"

My father related to us and said, "Wakīf said, 'The *ḥadīth* of

²¹This response concerns distinguishing between the fornicator and the adulterer. Each is punished in accordance with his (or her) status. Also see below, n. 23.

Hammād b. Zaid on the authority of Ayyūb on the authority of Ibn Sirīn is that a man named Jabala, one of the Prophet's Companions, who was in Egypt, was married to a man's former wife and his daughter by another woman, at the same time."

§88 I asked my father about a man who buys a female slave together with her daughter, has intercourse with the daughter, and then manumits her. "Is it permissible for this man to have intercourse with the mother since he has freed the daughter?"

He said, "No." He found this practice reprehensible and did not allow it. Further, he recited this *āya*: *Forbidden unto you are your mothers, and then, your mothers-in-law* (4:23).

I asked my father about an *āya* when it has a general ('āmm) meaning.

He said, "Its interpretation is by means of the *sunna* [recorded] in *ḥadīth*. When an *āya* has an apparent sense (*ẓāhir*), then one considers what the *sunna* has set out concerning it. The *sunna* is a guide to the apparent sense of an *āya*. For example, His saying, *Allah chargeth you concerning (the provision for) your children* (4:11). Understood [simply] according to its apparent sense, this *āya* would mean that anyone who could be defined as one's children would inherit. But then the *sunna* makes it clear that a Muslim does not inherit from an unbeliever, nor an unbeliever from a Muslim, nor does a killer inherit, nor does a *makṭūb* slave. The *sunna* indicates what God meant."

I said to my father, "[What] if a woman is *mubhama*?"²²

He said, "The *mubhamāt* are three. Allāh said, *Your wives' mothers and your sons' wives*, and He said, *Do not marry women that your fathers married* (4:22). These are *mubhamāt*. If a man marries a woman, her mother is forbidden to him, to his father, and to his son, even if he has not had intercourse with her."

§89 I asked my father [whether] if a man marries a woman, he must give her her dower, or at least a portion of it, before having intercourse with her; or whether he can wait until after he has had intercourse with her.

He said, "He can give her something [of her dower] before he has intercourse with her, but if he does not give her [any of it] until after that, . . .²³ He said, "That is permissible."

²²For the meaning of *mubhama*, see Lane, s.v. "b h m": "Applied to a vow, and to [certain ordinances respecting] marriage and divorce and emancipation, from which there is no getting out or extricating oneself. . . . Prohibited unconditionally; as the prohibition of [the marriage with the mother,] and the sister. . . ."

§90 My father said [something] about a man who marries a woman for a dower of what the[ir] relatives agree upon. . . ."

§91 I read to my father: "The slave may give in marriage his brother's or his wife's daughter."

He said, "No. Her *walī* gives her in marriage, or the judge (*sultān*) if she has no *walī*."

A Man Marrying a Woman within the Forbidden Degrees

§92 I asked my father about a man who marries a woman within the forbidden degrees unknowingly and then learns of it.

He said, "If he did it intentionally, then he is beheaded and his property confiscated. But if he did not realize [she was within the forbidden degrees], the couple are separated. It is appropriate" (*istahsana*) that the wife keep what she has taken (i.e., the full dower), and he has no claim against her for any of it."

I said to my father, "The *ḥadīth* of al-Barā' is that a man arranged for a wedding feast with a wife of his father's."

He said, "He must have done it knowingly. He married and arranged for a wedding feast with his father's wife. He can only have done it knowingly."

I asked my father about the *ḥadīth* of the Prophet that a man married a wife of his father's, and the Prophet ordered him killed and his property confiscated.

My father said, "I think, and God knows best, that the Prophet deemed that the lawful way [to handle the matter]. He ordered that he be killed, like the apostate, and his property confiscated."

My father said, "Equally, in the case of the apostate his family does not inherit from him, because the Prophet said that a Muslim does not inherit from an unbeliever, nor an unbeliever from a Muslim."²⁴

§93 I asked my father about a man who says to his female slave, "When you have given birth, you are free." Then she has a miscarriage.

He said, "She is manumitted," and he adduced as proof the *ḥadīth* of Abū Dharr and one of his slaves. He said, "When the time came, he manumitted [her]."

I said to my father, "[What] if he wishes to marry her after that?"

He said, "It is best that he reconfirm her manumission and ask

a [second] man to give her in marriage to him, with her consent, while he is acting as her *wali*.^{hh} That is, the man who manumitted her should have a second man give her in marriage to him."

994 I heard my father give an opinion concerning a man who marries his sister without realizing it. He said, "If such a man has had intercourse with his sister, she receives the dower which he designated for her."

995 I asked my father about a man who sees a woman. "Can he then marry her?"

He said, "If he has contemplated her lustfully, then no. But if he has not, there is no harm [in that]."

996 My father related to us and said, "Someone read toⁱ Sufyān b. 'Umar and handed to Abu'l-Sha'thā a sheet of paper (*ṣahifa*) [on which was written], 'Ikrima was asked^j about a man who fornicates with a woman and then sees her nursing a girl. Would the girl be a lawful wife for him?' He (i.e., 'Ikrima) said, 'No.'"

My father said, "And this is what I say."

997 I asked my father about the insane man when he pronounces a divorce.

He said, "His divorce is not permissible; neither is the divorce of a man delirious with fever." He said, "Everyone who is healthy, then loses his rationality because of illness, and then pronounces a divorce has not pronounced a divorce that has legal consequences."^{kk}

I said to my father, "What about the man in a state of intoxication?"

He said, "I used not to allow him [to divorce], but now I do."

I said, "Why?"

He said, "Because the intoxicated man is not irrational. This is what Shāfi'ī used to say: 'I find the intoxicated man is not irrational.'"

A Man Marrying His Daughter's or His Son's Foster-Sister

998 I asked my father about a man who marries a woman and then gives one of his sons in marriage to her sister.

He said, "There is no harm in this." And he said, "There is also no harm in his giving her daughter in marriage to his son. For if it is the father [of one of them] who has married the mother [of the other], there is no harm in it."

He said, "[If] a man has a son and a woman nurses him together with a certain girl, there is no harm in the man marrying that girl; she is his son's [foster-]sister."

He also said, "If^l this woman nursed a man's sister and a certain girl, then she is his sister's [foster-]sister, [but] there is no harm in his marrying her. There is no harm in a man marrying his sister's [foster-]sister."

A Man Manumits a Female Slave and Marries Her

999 I asked my father about a man who manumits a female slave and then decides to marry her.

He said, "There is no harm in this. In this matter I follow the *ḥadīth* of Shu'aib b. al-Habbāb and Thābit and Qatāda and 'Abd al-'Azīz b. Ṣuḥaib on the authority of Anas b. Mālik that the Prophet manumitted Safiyya and made her manumission her dower."

My father related to me and said, "Ismā'īl related to us and said, 'Abd al-'Azīz b. Ṣuḥaib on the authority of Anas b. Mālik that the Prophet manumitted Safiyya and married her. Then Thābit said to him, 'What did he give her as a dower?' Anas b. Mālik said, 'Herself. He manumitted her and married her.'"

A Man Marries a Woman for [a Dower of] Manumitting Her Father

1000 I read to my father:^{mm} 'Abduh b. Sulaimān said, "Ismā'īl b. Abī Khālid related to us and said, 'Al-Sha'bī was asked about a man who marries a woman for [a dower of] manumitting her father, [but then is not able to do so]. He said, 'This man estimates the price of the woman's father, then gives her his [equivalent] value.'"

I heard my father say, "This is what I say. The man estimates his [wife's father's] value."

1001 My father related to me and said, "Muḥammad b. Ja'far related to us on the authority of Shu'ba, who said, 'I asked al-Hakam and Hammād about a man who deflowers a free woman, and they said she receives no dower.'"

I asked my father [what he thought] about that, and he said, "She receives a fair dower and he, a *ḥadd* punishment. If he has

never been married (*bikr*), he is flogged one hundred strokes and exiled for one year."²³

- §102 I asked my father about a man who finds one of his male slaves with one of his female slaves. "[What if] she then gives birth?"

He said, "Physiognomists are called on her behalf, and the child belongs to him, if they determine that it is his. That is, if they determine it by resemblance."

My father mentioned the *ḥadīth* of Mujazziz al-Mudlijī, who said, "These feet resemble each other."²⁴

My father said, "In 'Ā'isha's *ḥadīth* it says, 'And he saw an exact resemblance to 'Utba.'"²⁵

- §103 I asked my father about a man who has intercourse with a free virgin and hence deflowers her. "Must he pay her a dower in addition to receiving a *ḥadd* punishment?"

He said, "Yes, he receives a *ḥadd* punishment, and he must pay her a fair dower."

- §104 I asked my father about a man who has a female slave and frees her by means of *tadbīr*. "[What if] he then has intercourse with her and she gives birth?"

He said, "The *tadbīr* is no longer legally effective. She becomes an *umm al-walad*, and her offspring are free."

I asked, "What if he gives her in marriage?"

He said, "..."

I said to my father, "[What about] the *ḥadīth* of Jābir b. Zaid [that] the offspring of a *mudabbara* are slaves?"

He said, "I do not follow this *ḥadīth*."

- §105 My father related to me and said, "Muḥammad b. Ja'far related to us and said, 'Sa'īd related to us on the authority of Abū Ma'shar on the authority of al-Nakha'ī, who said, 'If a woman's second husband has had intercourse with her, then she can return to her first husband [only] on the basis of a new marriage contract and a new dower. But if the second husband has not had intercourse with her, then she can return to her first husband on the basis of however many divorces the marriage has behind it ('*alā mā baqiya min ṭalāqihā*).'"

²³Since the man has never been married, he is not *muḥṣan* and receives the penalty for fornication (see above, AA 86).

²⁴See Nasā'ī, *Sunan*, 6: 184 (*Bāb al-qāfa*), for this tradition, in which 'Ā'isha relates that Mujazziz identified Usāma b. Zaid as the son of Zaid b. Thābit by comparing [the soles of] their feet. See also Ibn Hanbal, *Musnad*, 6: 82.

²⁵See Nasā'ī, *Sunan*, 6: 180 (*Bāb ilhāq al-walad bi'l-firāsh*), for this statement of 'Ā'isha's, which refers to the story discussed in AA 31.

My father said, "And this is our doctrine."

My father related to me and said, "Muḥammad b. Ja'far related to us and said, 'Sa'īd related to us on the authority of Ya'la b. Hakīm on the authority of Sa'īd b. Jubair that 'Abd Allāh b. 'Umar said, "...'"

- §106 I asked my father about the *ḥadīth* of Muḥammad b. Sīrīn that [once] 'Alī was presented with a young woman, and he asked whether she were *khuluw*.

My father said, "The word *khuluw* in this *ḥadīth* means that she is someone without a husband."

The Book of Divorce

- §107 'Abd Allāh said: "I heard my father state [the doctrine] "There can be no divorce before ownership (*milk*, i.e., a wife must actually be living with her husband), and no manumission²⁶ except after possession." My father said, "I hesitate to say anything about this [matter]," as if it were something he consigned to Allāh's power [only]. [He added,] "Some (*qawm*) have distinguished between divorce and manumission."

He related to us²⁶ and said: I asked my father about a man who swears that when he marries a certain woman, she is triply divorced.

He said, "If he marries [her], I do not order him to separate [from her]."

I said to my father, "What if he says, 'In thirty years?'"

He said, "I [still] do not order him to separate from her."

- §108 He related to us²⁷ and said: I asked my father about a man who has a wife and puts her matter into her hands, intending [to give her the power to divorce herself] singly. Then a relative makes a suggestion to her and says, "Exercise your option to divorce yourself triply." Is this woman divorced triply or singly in accordance with the divorce the husband intended?

[He said,] "The husband should take an oath [as to whether he meant singly or triply], and the divorce is in accordance with what he intended."

²⁶A transmitter of these responses from 'Abd Allāh appears here for the first time and in a number of subsequent responses. No names are mentioned in the text.

²⁷It is not clear whether this transmitter is the same as the one referred to in the previous section.

I said to my father, "Suppose that later on, after she has left his house and separated from him on the basis of this definite (i.e., triple) divorce, he swears and says, 'If I marry *Fulāna bt. Fulān b. Fulān* (i.e., a certain woman), she is triply divorced.' Then if she marries another husband, can they return to each other, since she has been divorced in that manner permanently, despite the fact that he has [since] thought about her and wants to return to her? Is it permissible for him to return to her?"

My father said, "I prefer that he not marry her, for that would simply constitute [her] returning [to him]. What has been related on the authority of 'Amr b. Shu'aib on the authority of his father on the authority of his grandfather is that the Prophet said, 'There can be a divorce only after a marriage,' and [in the case just mentioned] she would be returning to him [without having been married to him]. Therefore, I would order him not to approach her."

§109 'Abd Allāh related to us and said: I heard my father asked about a man who says, "Every woman I marry is divorced."

My father said, "I do not order him to separate [from any wife he marries] regardless of whether he has specified a time."

He related to us and said: My father related to us and said, "Hushaim related to us and said, 'Amir al-Ahwal informed us on the authority of 'Amr b. Shu'aib on the authority of his father on the authority of his grandfather, who said, 'The messenger of Allāh said, 'No oath should be taken by a man concerning the disposition of something that is not in his possession; no slave should be manumitted before actually being taken into physical custody, and no woman divorced before she is actually married.'""

He related to us and said: My father related to me [that] Abū 'Abd al-Ṣamad al-Ummay said, 'Maṭar al-Warrāq related to us on the authority of 'Amr b. Shu'aib on the authority of his father on the authority of his grandfather, on the authority of the Messenger of Allāh, who said, 'Neither divorce, nor manumission, nor sale, nor fulfillment of an oath is permissible regarding [the disposition of someone or] something a man does not actually possess,' and [the Messenger of Allāh also said,] 'No divorce [is permissible] for a man of [a woman] whom he does not possess.'"

He related to us and said: My father related to me, "Hajjāj related to us on the authority of Mubārak, who said, 'I heard al-Hasan say, and he swore to me about it, [that he had it] on the

authority of 'Ali, who said, concerning a man who had declared that if he married *Fulāna* she was divorced, "If you do indeed marry her, she is not divorced [from you].""

He related to us and said: My father related to me, "Hammād b. Khālid al-Khayyāṭ related to us and said, 'Hishām b. Sa'd related to us on the authority of al-Zuhri, on the authority of 'Urwa on the authority of 'Ā'isha: "There can be divorce only after marriage.'"

He related to us and said: My father related to us and said, "Yahyā b. Sa'd related to us on the authority of Ibn Juraij, who said, 'Āṭā' informed me on the authority of Ibn 'Abbās, who said, "There can be divorce only after marriage, and there can be manumission only after actual physical possession.'"

§110 He related to us and said: My father related to us and said, "Muhammad b. Ja'far and Hāshim b. al-Qāsim related to us; they said, 'Shu'ba related to us on the authority of al-Hakam on the authority of 'Ali b. Husain that he said, and Mujāhid and Ismā'il [also said] on the authority of al-Sha'bi, who said, "I went to see Fāṭima bt. Qais, and I asked her about the Prophet's judgment (*qadā'*). She said that her husband had divorced her *al-batta*, and she had brought legal action against him to the Prophet for lodging and maintenance. She said, 'But the Prophet granted neither lodging nor maintenance and ordered me to wait an *'idda* in the house of Umm Maktūm's son.'"

He related to us and said: I said to my father, "There are no [authoritative] predecessors [of ours] among those who say anything concerning the *ḥadīth* of Fāṭima bt. Qais."

He replied, "Praise be to Allāh! Al-Sha'bi, the *faqīh* of Kufa, mentioned it and al-Hasan, the *faqīh* of Basra; they both follow it."

He related to us and said: I heard my father asked whether the [triply] divorced woman is entitled to lodging and maintenance.

He said, "No, I follow the *ḥadīth* of Fāṭima bt. Qais."

He Was Asked about the Divorce of the *Mukhtalī'a* and the *Sunna* concerning *Khul'* and Divorce in General

§111 He related to us and said: I asked my father about the *mukhtalī'a* whose husband divorces her while she is waiting her *'idda*.

He said, "Divorce has no legal effect on her."

- §112 He related to us and said: While I was listening, my father was asked about a man who says to his wife, "You are divorced (*anti talīq*)" three times.

He said, "If the couple have not had intercourse, this statement counts as a single divorce, because the wife is definitely divorced (*bānat*) by means of the first statement. But if the couple have had intercourse, and if the husband, by saying 'You are divorced' three times, wants to make his wife understand more clearly, but really means a single divorce, then I prefer that it be considered a single divorce. However, if [that is] not [what the husband wants], then it is a triple divorce."

Someone said to him, "What if a man divorces his wife before having intercourse with her?"

He said, "Then I prefer that it be considered a single [definite] divorce."

Someone said to him, "What if a man divorces his wife triply before having intercourse with her?"

He said, "She is not lawful for him until she has been married to another man."

- §113 He related to us and said: I heard my father asked about repudiation by means of *zihār*, before marriage.

He said, "It is binding for the man [who pronounces it], because it is an oath, and it is not in the same category as divorce (*laisa bimanzilāt a-talīq*)." Thus he followed the *ḥadīth* of 'Umar b. al-Khaṭṭāb.²⁸

- §114 He related to us and said: I heard my father asked about a man who says to his wife, "Choose!"

He said, "If she chooses herself, it counts as a single divorce. If she chooses her husband, there has been no divorce."

- §115 He related to us, he said . . . (see §53).

- §116 He related to us, he said . . . (see §54; also §120).

Connecting Divorce to Intercourse

- §117 He related to us and said: I asked my father about a man who says to his wife, "You are divorced if I do not have intercourse with you today, and you are divorced if I perform my ablutions after [having had intercourse with] you today."

²⁸See Mālik, *Muwatta'*, 3: 177, for a tradition that 'Umar ordered a man who married a woman whom he had repudiated by means of *zihār* before their marriage to expiate his oath before having intercourse with her.

My father said, "He may pray the *ʿaṣr* prayer, then have intercourse with her, and then when the sun goes down, he may perform his ablutions, as long as he did not mean by his statement 'If I perform my ablutions' [ablutions specifically after having had] intercourse."²⁹

Divorcing [a Woman] By [Saying] In *Shā'a Allāh*

- §118 He related to us and said: I asked my father about a man who says to his wife, "You are divorced, in *shā'a Allāh*."

He said, "I have no opinion on this matter." [Then] he said, "Mālik did not approve of it."

- §119 He related to us and said: I asked my father about the divorce of the intoxicated man.

He said, "There is disagreement on it. Ibn Abī Dhī'b transmitted on the authority of al-Zuhri on the authority of Abān b. 'Uthmān on the authority of 'Uthmān, who said, 'Neither the insane nor the intoxicated man can divorce.' This is the best information on this matter (*arfa'u shai'in fihi*), but Rajā' b. Haiwa said that Mu'āwiya permitted it."

He related to us and said: I asked my father about the divorce of the madman.

He said, "Since he does not conduct his life rationally, his divorce pronouncement is not valid. The same is true of the man delirious with fever and of the sleeping man."

I said to my father, "What then [do you think] of the man in a state of intoxication? Do you think he is [irrational] in this sense (i.e., like the others)?"

He said, "No." And he adduced as proof Shāfi'i and said, "The pen is not lifted for the man who is intoxicated. Further, it is not permissible to divorce silently. A divorce is not valid until it is pronounced aloud. Once it is pronounced aloud, it is valid."

My father said, "Shāfi'i said, 'I find the pen is not lifted for the drunk.'" This opinion pleased my father and he followed it.

- §120 (Same as §54; also §116).³⁰

- §121 He related to us and said: I asked my father about a man who marries a woman for one thousand dirhams. He gives them to her, then asks for them back as a gift. She gives them to him, then he divorces her before intercourse.

²⁹For the ablution performed before prayer, see *El*, s.v. "Ghusl," s.v. "Ṭahāra," and s.v. "Wudū'." Muslims start the twenty-four-hour day at sunset.

My father said, "She cannot reclaim the money, if she gave it to him of her own free will."

- §122 He related to us and said: I asked my father about a man who swears he will not seek refuge in a certain house. What is the limit for his seeking refuge? What is the time limit involved in seeking refuge?

He said, "Seeking refuge is one hour." He adduced as proof this *āya*: *Did you see when we took refuge on the rock?* (18:63) and said, "It is only a small amount of time, or as Allāh wishes."³⁰

- §123 He related to us and said: I asked my father about a man who said to his wife, "You are divorced, *al-batta*."

He said, "Umar made it" a single divorce, but 'Alī and Zaid and Ibn 'Umar said *al-batta* was triple."

I think it was as if he³¹ were afraid to make it triple, for he said, "I do not give a *fatwā* about any aspect of it (i.e., *al-batta*)."

He Was Asked about *Īlā'*

- §124 He related to us, he said: My father dictated to me when I asked him about *ilā'*:

He said, "[Whenever] a man swears not to approach his wife for a year, or [in any case], more than four months, she separates from him on the basis of a single divorce, the marriage being suspended after the passage [of four months, at which point]" he must either have intercourse with his wife or divorce her.

"Some scholars say that *ilā'* is a divorce, but not a final one. Some say that if a man swears he will not have intercourse with his wife for a period of fewer than four months, it is not [an instance of] *ilā'*. Some say it becomes [an instance of] *ilā'* when four months have passed.

"When a man says, 'By God, I will not have intercourse with you in this house for a year,' that is not *ilā'*, because he can, if he wishes, have intercourse with her elsewhere.

"Some scholars say she waits an *idda* after he has separated [himself from her], the *idda* of the divorcée, and that would be after the passage of four months.

³⁰This response seems misplaced. It is a brief exegetical remark about a verse from the Sūra of the Cave. The verse is one of a number that tell a story about Moses. For this story, see the Qur'ān, 18:60–82, and *EL*, s.v. "*Khidr*."

[I said to my father,] "It has been related on the authority of Ibn 'Abbās [that] he said, 'Do not prolong things for her; when four months have passed, no *idda* is required.'" I said to my father, "What do you say?"

He said, "I say that when four months have passed after a husband has sworn not to have intercourse with his wife for more than four months, and she comes to ask him after this period of time [what his intentions are], the marriage is suspended. At that point, the husband either has intercourse with his wife or he divorces her. There is no divorce until the marriage has been suspended and the husband has pronounced a divorce. If he does, the wife waits the *idda* of a divorcée. But if things go on, and a year or more passes [without a husband's having intercourse with his wife], a divorce has not [automatically] resulted. If a husband does divorce his wife, she waits the *idda* of a divorcée, three menstrual periods if she menstruates, three months if she does not.

"The suspension [of a marriage] most closely resembles the Book because of Allāh saying: *Those who forswear their wives*—that is, who take an oath—*must wait four months; then if they change their mind* (2:226) (i.e., have intercourse with their wives). . . . Then if intercourse occurs" after the passage of four months, no divorce occurs, unless [it has been effected] by means of the husband [pronouncing it], because He said, *Then if they change their mind, Lo! Allah is Forgiving, Merciful. And if they decide on divorce. . . .* (2:226–227). These are two separate issues created by *ilā'*. Divorce does not simply come about from the passage of months. Further, a man may not hinder his wife from marrying. If he suspends the marriage, he should either have intercourse with her or divorce her.³² He is hindering her from marrying if he does not have intercourse with her.³³ A man came to 'Ā'isha, and she said to him, 'You had better have intercourse' (i.e., after the lapse of a four-month period)."

He related to us and said: [My father] related to me: "Abū Bakr b. Abī Shaiba said, 'Wakī' related to us on the authority of Sufyān on the authority of al-Sibānī on the authority of Bukair b. al-Akhnas on the authority of Mujāhid on the authority of 'Abd al-Rahmān b. Abī Lailā that 'Alī suspended a marriage (i.e., after four months).'"

He related to us and said: My father related to me: "Wakī' related to us: 'Mis'ar on the authority of Ḥabīb b. Abī Ḥābit on

the authority of Tāwūs on the authority of 'Uthmān that he used to say, concerning the man who takes the oath of *ilā'*, "The Mā-dinese say *ilā'* suspends a marriage."³⁰

He related to us and said: My father related to me: "Abd al-Razzāk related to us and said, 'Ma'mar informed us on the authority of Qatāda that Abu'l-Dardā' and 'Ā'isha said that a man who has taken the oath of *ilā'* suspends his marriage at the end of four months. Then either he must resume sexual relations [with his wife] or divorce her.'"

He related to us and said: My father related to me: "Ḥajjāj related to us and said, 'Sharīk related to us on the authority of Simāk b. Ḥarb on the authority of Sa'īd b. Jubair, who said, 'There was once a quarrel between one of the *anṣār* and his wife. Then he swore that he would not touch his wife. 'Umar b. al-Khaṭṭāb came to them to mediate, but they refused to make it up. So 'Umar said, 'If you two refuse to make it up, then when four months have passed, you (i.e., the husband) must divorce her, if you have not had intercourse with her.'"

He related to us and said: My father related to me, "Sufyān b. 'Uyayna related to us on the authority of Yahyā b. Sa'īd on the authority of Sulaimān, who said, 'Sufyān, I think, said, "I knew ten companions of the Prophet whose doctrine about *ilā'* was that it suspended a marriage.""

He related to us and said: My father related to me, "Hushaim related to us on the authority of al-Shaibānī on the authority of al-Sha'bi, who said, "Amr b. Salama" al-Kindī informed us that he witnessed 'Alī, at the end of four months, [either make a man] resume sexual relations [with his wife] or divorce her."

§125 He related to us and said: I asked my father about divorce under coercion.

He said, "On that, I follow the *ḥadīth* of Thābit al-Aḥnaf, that is, of Mālik b. Anas regarding the divorce of a man who is tortured or beaten."

I said to my father, "Tortured with what?"

He said, "If someone's leg is squeezed, in accordance with the *ḥadīth* of Thābit al-Aḥnaf, or he is exposed to the heat of the sun the way 'Ammār was exposed, or tortured by various other means."³¹

³⁰ See Ibn Hanbal, *Muṣnad*, I:404, for one version of the story of 'Ammār and several other of the earliest Muslims tortured by the pagan Meccans who dressed them in armor and then laid them out in the hot sun.

He Was Asked about *Khalīya*, *Barīya*, and *Ḥarām* [Divorces]

§126 He related to us and said: I asked my father about a man who says to his wife, "You are forbidden to me (*anti 'alaia harām*)."

He said, "[He must do] the expiation for *ḡihār*."

I said, "What is the amount of the expiation for *ḡihār*?"

He said, "Manumitting one slave; but if a man is unable to find [a slave to manumit], then fasting two consecutive months. But if he is [also] unable to fast, then feeding sixty poor people, each of whom should receive a *mudd* of wheat."

I said, "[How heavy is] a *mudd*?"

He said, "A *mudd* is one and one-third *raṭls*."

§127 He related to us and said: I asked my father, I said, "[What if] a man says to his wife, 'Anti *khalīya*' or 'Anti *bā'ina*,' or 'Anti *barīya*,' or [a statement with] *al-batta*, or a divorce [statement] of prohibition,³² or [one such as], 'You have free rein,' or other [statements] of this kind?"

He said, "I fear they count as triple divorces, but I do not give a *fatwā* on this question."

§128 I said to my father, "[What if] a man says to his wife, 'I make you [yourself] a present to your relatives'?"

He said, "If they accept her, it counts as a single divorce, and he has the right to have her return to him. If they reject her, it has no legal effect."

Another time, he said, "Such a statement has no legal effect."

§129 (Same as §114).

§130 He related to us and said: I heard my father say, "If a man pronounces a divorce silently, while asleep, or while ill and [hence] raving, it has no legal consequences."

§131 My father said, "If the slave divorces [on his own initiative] he is validly divorced, because he has the right to divorce. A master cannot divorce on behalf of his slave. If the master coerces his slave to the point where he tortures him, the divorce is not valid."

He Was Asked about the Established Procedures
(*Sunan*) for *ḡihār* and What the *Qur'ān*
Says about *ḡihār*

§132 He related to us and said: I heard my father say, "God said: *Such of you as put away your wives (by saying they are as their mothers)—They are not their mothers; none are their mothers except those*

who gave them birth. . . . Those who put away their wives (by saying they are as their mothers) and afterward would go back on that which they have said, (the penalty) in that case (is) the freeing of a slave, before they touch one another. . . . And for him who is unable to do so (the penance is) feeding of sixty needy ones" (58:2-4).

My father said, "Zihār is an oath and must be expiated before the couple have intercourse again.

"If a man repudiates his wife by means of *zihār*, then divorces her, he need not do the expiation [of *zihār*]. *Zihār* occurs when a man says to his wife, 'You are to me like the back of my mother,' or 'my maternal aunt,' or 'my paternal aunt,' or 'my mother-in-law,' or any woman forbidden to him by consanguinity or foster-relationship.

"It is possible for a man to repudiate a female slave by means of *zihār*, if she is a wife [of his]. If he owns her (i.e., without being married to her), repudiating her by means of *zihār* is not possible."

My father said, "Expiation is incumbent upon a man in the case of [repudiating] his female slave and his *umm al-walad* by means of *zihār*. Ibn 'Umar ordered expiation for [*zihār*] either before or after a man has broken his oath by having intercourse with his wife, and Sulaimān ordered it before."

My father said, "If a woman dies after a man has repudiated her by means of *zihār*, he inherits from her, and the expiation of *zihār* is not incumbent upon him. Similarly, if a man divorces his wife and makes her divorce *al-batta*, after repudiating her by means of *zihār*, he need not do the expiation for *zihār*. However, if he divorces her *al-batta* and then returns to her, he cannot have intercourse with her until he has expiated his oath of *zihār*. And if he divorces her triply, and then she marries and is divorced from a second husband, and then he returns to her, he may not have intercourse with her until he has expiated his oath of *zihār*."

Concerning the 'Idda and What the Qur'ān Says about It

§133 He related to us and said: I asked my father about a woman whose menstrual periods stop after her husband has divorced her and who does not know why they have stopped.

My father said, "In accordance with what 'Umar said, she waits an 'idda of nine months for pregnancy and three months

in place of menstruation, that is, one year." He said, "But if she knows why she stopped menstruating—illness, childbirth, or nursing—then she must complete an 'idda of three menstrual periods, even if that takes a long time. This is a *ḥadīth* of Waki' on the authority of al-A'mash on the authority of Ibrāhīm on the authority of 'Alqama, namely, that he divorced his wife, who then became ill and stopped menstruating for sixteen or seventeen months. 'Abd Allāh [b. Mas'ūd] said, 'Allāh has kept her inheritance for you,' and he made 'Alqama inherit from his wife, because he knew why she had stopped menstruating. Waki' added 'she became ill' which is not in anyone else's *ḥadīth*, but Maṣṣūr b. al-Mu'tamar related it, also saying 'she became ill.'"

§134 He related to us and said: I asked my father about a woman who does not menstruate and who has been divorced. Then she waits two [of the three] months of her 'idda, but in the third month [starts to] menstruate. "Does she start [waiting her 'idda over] again in terms of three menstrual periods?"

He said, "Yes."

He related to us and said: I read to my father [on the authority of] Waki' on the authority of Hammād b. Zaid on the authority of Ḥafṣ on the authority of al-Ḥasan who said, "The woman who menstruates is divorced in terms of *aqṛā*."

My father said, "That is what I say also."

§135 He related to us and said: I asked my father, may God have mercy upon him, "How long is the 'idda of the *umm al-walad* after her master has died, or after he has manumitted her?"

He said, "Her 'idda is one menstrual period. Indeed, she is a slave with respect to all her circumstances: if she commits a crime, then her master bears the responsibility; if a crime is committed against her, the criminal is liable for whatever amount he has diminished her value; if she dies, whatever she leaves belongs to her master; if she receives a *ḥadd* punishment, it is the punishment of a slave; if her master gives her in marriage, her children are in her position—they become free if she is freed, and they are slaves^{bab} if she is.

"On the question of her 'idda, scholars have disagreed. Some say it is four months and ten days, but this is the 'idda of a free woman, or a slave who has become free. Therefore those who say four months and ten days must make her inherit and make her a free woman in all legal judgments applied to her, because they place her, in her 'idda, in the position of a free woman. Some say her 'idda is three menstrual periods, but this is a point

of view with no argument to support it (*wajh*); rather the [free] divorcée waits an *'idda* of three menstrual periods, and this woman is neither a divorcée nor free. Allāh mentioned the *'idda* of the widow, and He said, *And those of you who die, leaving wives, they shall wait by themselves for four months and ten nights* (2:234). The *umm al-walad* is neither free nor a wife, that she should wait four months and ten days.^{30c} Allāh said, *Women who are divorced shall wait, keeping themselves apart for three (monthly) courses* (2:228). But the *umm al-walad* is a slave who [as a widow] is emerging from slavery to freedom."

§136 He related to us and said: I heard my father say, "The widow waits an *'idda* of four months and ten days. The divorcée, of three menstrual periods, if she menstruates. Then she is lawful for other [potential] husbands, unless she is pregnant. Every pregnant woman's term ends with her delivery, whether widow or divorcée. Then she becomes lawful in accordance with His saying, *And for those with child, their period shall be till they bring forth their burden* (65:4). If a woman is a slave and is married to a slave husband who dies, she waits an *'idda* of two months and five days. [If she is divorced and] if she menstruates, then [her *'idda* is] two menstrual periods. But if she is too young or too old to menstruate, she waits an *'idda* of two months in place of the two menstrual periods.^{30d} Maybe some say [that she waits an *'idda* of] one and one-half months, but I prefer two months, in place of two menstrual periods."

§137 [He continued,] "Likewise, if a female slave is married to a free man, her *'idda* is the same length of time it would be if she were married to a slave. Scholars have not known [this] and have disagreed [about it]. The length of the *'idda* is in accordance with the status of the wife. 'Uthmān b. 'Affān and Zaid b. Thābit said that divorce was in accordance with the status of the man; *'idda*, in accordance with the status of the woman. Ibn 'Umar said that if men are slaves, divorce procedures should be shortened accordingly and that the length of time of an *'idda* is in accordance with the status of the woman."

Problems of *Istibrā'*

§138 'Abd Allāh related to us and said: I asked my father how long a man should abstain from having sexual intercourse with a female slave [he buys].

He said, "If she menstruates, he must abstain from [inter-

course with] her for one menstrual period. Then, he may have intercourse with her."

I asked, "May he have intimate contact with her other than that of sexual intercourse before she has had a menstrual period?"

He replied, "I prefer him not to. It is not certain that she is pregnant by another man, but he might do something unlawful."

I said, "What about a man who buys a female slave not old enough to menstruate?"

He said, "He abstains from having sexual intercourse with her for three months."

I said, "Why do you differentiate between the pre- and post-pubescent girl?"

He said, "Because pregnancy does not become apparent in less than three months, and [in this case] the girl is prepubescent and too young to menstruate."

I said to my father, "May he have intimate contact other than that of sexual intercourse with his prepubescent female slave?"

He said, "Not until he has abstained from having sexual intercourse with her for three months."

He said: I said, "Is one month long enough?"

He said, "No, it must be three months."

§139 He related to us and said: I asked my father about a man who buys a female slave who is too young to menstruate. "How long should he refrain from having sexual intercourse with her?"

He said, "For three months."

I said to my father, "What about intimate contact other than that of intercourse? Can he, for example, touch or kiss her?"

He said, "I prefer him not to do that. He should wait an *isti-brā'*, for I cannot be certain that if he does touch or kiss her and she is pregnant, he will not do so in an unlawful manner."

He Was Asked about the Divorce of the Man Who Is Ill, Sleeping, or Insane, and the Man Who Swears He Will Be Divorced on the Basis of an Event about Which It Is Impossible to Clean Information, and Various Other Problems³²

§140 He related to us and said: I asked my father about a man who has four wives, then divorces one of them triply. "Can he marry another woman before the *'idda* of the one he divorced is over?"

³⁰None of the problems under this title deal with the man who is ill, sleeping, or insane.

He said, "He cannot marry a fifth woman until the *'idda* of the woman he divorced is over, because if he had four wives and divorced them triply while ill and then married four more before the *'iddas* of the first four were over and then he died, they would all inherit from him. If he died in that last illness of his, then eight women would inherit from him."

[I asked], "Whose doctrine is it that there is no harm in his marrying the fifth wife (i.e., before the *'idda* of the woman he divorced is over)?"

My father said, "The Madinese say there is no harm in his marrying the fifth, when he has divorced one of them definitely."^{ccc}

My father said, "If he says, 'I divorce you all triply,' then a triple divorce is applicable to each of them in turn. If he divorces her (i.e., one of his wives triply) while ill, then she inherits from him as long as she is in her *'idda* and after it, as long as she has not remarried. It is transmitted on the authority of 'Uthmān b. 'Affān that he made such a woman inherit after the end of her *'idda*. And it is transmitted on the authority of 'Ubaiy b. Ka'b that she inherits from him, as long as she has not remarried. The Madinese say that she inherits from him after the end of her *'idda*, even if she has remarried."

§141 He related to us and said: I said to my father, "[What] if a man says to all four of his wives, 'I divorce you all?'"

He said, "[The divorce is] in accordance with what he intends. If he intends a single divorce, then it is single."

§142 He related to us and said: I said to my father, "If a man divorces his wife triply, can he marry her sister before the *'idda* of his divorced wife is over?"

He said, "He cannot marry her sister until the *'idda* of his divorced wife is over."

He related to us and said: I said to my father, "What if the wife whom a man divorces is pregnant? Can he marry her sister?"

He said, "He cannot marry her sister until she (i.e., his divorced wife) has completed her pregnancy."^{ddd}

§143 (Same as §130.)

§144 He related to us and said: I asked my father about two men past whom a bird flies. One man says his wife is divorced triply if that was not a bird, and the other says his wife is divorced triply if it is not a crow. Then the bird flies away.

My father said, "They both abstain from having intercourse with their wives^{eee} until the question can be clarified."

§145 He related to us and said: I said to my father, "A man divorces triply but means singly."

He said, "It counts as a triple divorce."

Someone said, "What happens if a man divorces singly, but means triply?"

He said, "It counts as a single divorce, because his intention was in what he hid and not in what he made obvious."

§146 He related to us and said: I said to my father, "A woman makes her husband a present of her dower. [What if] her husband subsequently sees fit to divorce her?"

He said, "If her husband asked her [for her dower], she is entitled to get it back. But if he did not, and she gave it to him of her own free will, she cannot reclaim it."

§147 He related to us and said: I asked my father about the divorce of the minor youth.

He said, "If he is mentally mature, his divorce is valid. If he is not, then it is not."

§148 He related to us and said: I asked my father about the triply divorced woman.

He said, "The triply divorced woman is not lawful to her husband, until she has married another husband who has been alone with her and had intercourse with her."

My father said, "The triply divorced woman waits an *'idda* of three menstrual periods, if she menstruates, or three months if she is either too young or too old to menstruate."

"The widow waits an *'idda* of four months and ten days regardless of her age, and she inherits [from her late husband] regardless of whether there has been intercourse. If she is pregnant, then her *'idda* is over when she delivers. If the widow's late husband did not specify a dower for her, then she receives a fair dower for a woman of her status, such as [the dower] her paternal aunt [might receive] and [women married to] the agnate male relatives with whom she lives. [If she dies first,] her husband inherits from her, [even] if he has not had intercourse with her, and [as long as] she has received her full dower from him. Except, he inherits half of everything she has left, if she has had no children. [This is the case] whether he has specified a dower or not specified one, and therefore she is entitled to the fair dower for a woman of her status. He inherits half of what she has left, whenever she has had no children."³³

§149 He related to us and said: I asked my father about a man whose wife is separated from him on the basis of a final divorce.

³³See Qur'an 4:12 for inheritance between husband and wife, and Coulson, pp. 35-38, for qur'anic heirs.

Then he remarries her during her *'idda*, and then he divorces her before having intercourse with her.

He said, "She receives half of the dower (i.e., the dower required for the new marriage) and completes what remained of her [first] *'idda*."

§150 He related to us and said: I asked my father about a man who pronounces a single divorce but means a triple divorce.

He said, "The divorce can be only in accordance with what he has actually said and what is obvious on his part."

§151 He related to us and said: I asked my father about a woman who says to her husband, "Divorce me, and I will give you one hundred dinars."

He said, "If he divorces her, she owes him one hundred dinars." And he said, "Indeed it is as if he were selling her something."

§152 He related to us and said: I asked my father about a man who says to his wife, "If you go out the door of this house without my permission or my knowledge, you are divorced." Then she goes out without his knowing and forgets [to tell him]. On that basis—without informing him that she went out—she resides with him, and he has intercourse with her. Then she informs him that she went out, and he says, "I return to you," thereby articulating one divorce and concealing another. Then she does not go out and stays in the house [for a while but] then goes out after he has said, "I return to you," without his knowing about it.

My father said, "If he meant by his statement that his wife is divorced whenever she goes out, then each time she went out, she was in fact divorced. But if he meant by his statement just that one time, then the marriage has only one divorce behind it."³⁴

He Was Asked about *Li'ān*

§153 He informed us and said: I heard my father say and he dictated to me [the following]: "God said, *As for those who accuse their wives* (24:6). Al-Hasan and Sa'īd b. al-Musaiyab said that each spouse can accuse the other. Others say that they cannot accuse

³⁴By having intercourse with his wife after the first time she went out, the husband has unknowingly returned to her. If he meant by his statement only one instance of his wife's going out, then the marriage has only one divorce behind it. Otherwise, the wife has been out more than once, so the couple have been divorced more than once.

each other unless they are two free Muslims. Then what do we say? [We ask whether] this is what the literal sense (*zāhir*) of the *āya* alleges [and] whether we find anything about it on the authority of the Prophet? And His saying, *Those who put away their wives (by saying they are as their mothers) and afterward would go back on that which they have said* (58:3). Some say one cannot repudiate a female slave³⁵ by means of *zihār*, because He said, *Those who put away their wives (by saying they are as their mothers)*. Some say if she is a slave and a woman with whom a man is permitted to have intercourse, then she is *min nisā'ihi*.³⁵ Al-Hasan al-Baṣrī says this. Some say *zihār* concerns intercourse, so they think repudiation by means of *zihār* is applicable both to the slave and the free woman.

§154 [My father continued,] "And His saying, *Such of you as die and leave behind them wives, they (the wives) shall wait keeping themselves apart, four months and ten days* (2:234). Muḥammad b. Sirīn and Makhūl said that if a woman is a widowed slave, she waits an *'idda* of four months and ten days. They followed the literal sense of the *āya*. However, mostly we have heard that she waits half the *'idda* of the free woman—two months and five days, because they have compared it (*shabbahū*) to divorce, so made incumbent upon her half the *'idda* of the free woman. This is found on the authority of the Prophet."

§155 [He went on,] "And His saying, *Women who are divorced shall wait, keeping themselves apart, three (monthly) courses* (2:228). The literal sense of the *āya* is that every divorcee, as long as she is not pregnant, waits an *'idda* of three menstrual periods. 'Umar b. al-Khaṭṭāb said concerning this, 'If I were able to make the female slave's *'idda* one and one-half menstrual periods, I would.' But he ordered her to wait an *'idda* of two menstrual periods, because menstruation cannot be divided. It is related on the authority of 'Alī that he said she waits an *'idda* of two menstrual periods, and one and one-half months if she does not menstruate. This is what he would always say: 'I do not judge until I know what the Prophet said about a given matter.'"

My father said, "But I follow 'Umar's doctrine: that if she does not menstruate, then two months, and if she does, then two menstrual periods."

³⁵The words *min nisā'ihi*, translated in Qur'an 58:3 as "their wives," can also have the more inclusive meaning of "their women." If they are taken to mean "their women," then the argument for saying a man can separate from a female slave by means of *zihār* is strengthened.

§156 [My father continued,] "And His saying, *Those who forswear their wives must wait four months* (2:226). The literal sense of the *āya* is that a wife wait four months, even if she is a slave."¹⁰ My father said, "But the majority opinion we have heard on the authority of the Successors is that the requisite amount of time [a wife waits] after the *īlāʾ* of a slave [husband] is half that of the free husband. However, some have related on the authority of al-Zuhri that he said the *īlāʾ* on behalf of a slave husband was four months."

§157 He related to us and said: I asked my father about *liʾān*.

He said, "A man slanders his wife, but she does not agree with him about what he has claimed against her. Thus when they bring the matter to the judge (*hākim*), he sets up a *liʾān* procedure between them. The husband starts by saying, 'I witness that I am telling the truth in slandering my wife'; [he says this] four times and the fifth time [says] that Allāh will curse him if he is lying in slandering his wife.

"Then the wife witnesses four times by Allāh that he is lying and the fifth time that Allāh will be angry with her if her husband is telling the truth.

"Then the judge separates the couple, and the wife is entitled to a dower and waits the *ʿidda* of a free Muslim woman—if she menstruates, three menstrual periods, if she does not, three months. If she is pregnant, her *ʿidda* is over when she delivers."

§158 He informed us and said: I heard my father asked about a Jewish or a Christian woman married to a Muslim man who slanders her.

He said, "He can institute *liʾān* proceedings against her."

§159 He related to us and said: I heard my father say that the triply divorced woman, the widow, and the female pilgrim should all eschew perfume.

§160 He related to us and said: I asked my father about a man who marries a woman for a dower of a piece of cultivable land and then divorces her.

He said, "If he has had intercourse with her, he must give her the land. If not, he gives her half the land."

The Book of *ʿIdda*

§161 Ibn Hanbal was asked about *aqraʾ*. ʿAbd Allāh said: I asked my father about *aqraʾ*, whether they are periods of purity or menstruation.

He said, "There is disagreement on this on the authority of the Companions of Muḥammad."

He related to us and said: My father related to me [that] ʿAbd al-Aʿlā related to us [that] Burd related to us on the authority of al-Zuhri on the authority of ʿUrwa on the authority of ʿĀʾisha that she said, "Do you really not know what *qurʾ* means? *Qurʾ* is what is between two menstrual periods. The moment a woman starts her third menstrual period she has become lawful and her *ʿidda* has ended."

The Minor Girl When She Waits an *ʿIdda* in Terms of Months, Then Menstruates during Her *ʿIdda*¹¹

§162 I asked my father about a minor girl who is divorced but does not yet menstruate. She waits two months of her *ʿidda*, but then when she is in the third month, she starts to menstruate. I said to my father, "Does she recommence waiting an *ʿidda*, [this time] of three menstrual periods?"

He said, "Yes."

The *ʿIdda* of the Widow, the Pregnant Woman, and Other Women

§163 He related to us and said: I heard my father say, "The widow waits an *ʿidda* of four months and ten days. The divorcee, if she menstruates, waits an *ʿidda* of three menstrual periods and then becomes lawful for [other] husbands. But if she does not menstruate, she waits an *ʿidda* of three months and then becomes lawful [for other husbands], unless she is pregnant. Every pregnant woman's *ʿidda* ends with her delivery, whether widow or divorcee. Then she becomes lawful, in accordance with His saying, *And for those with child, their period shall be till they bring forth their burden* (65:4), whether she is a widow or a divorcee.

§164 "If she is a slave wife who has been widowed, her *ʿidda* is two months and five days. If she [is a slave wife who has been divorced and] menstruates, her *ʿidda* is two menstrual periods. But if she is too young or too old to menstruate, her *ʿidda* is two months. Maybe some scholars say one month and one half, but I prefer two months in place of the two menstrual periods. This is the case if a slave woman is married to a free man. Her *ʿidda* is the same as the *ʿidda* of a slave woman married to a slave. Scholars did not know this [and] disagreed [on the fact] that the

length of the *ʿidda* is in accordance with the status of the woman. ʿUthmān b. ʿAffān and Zaid b. Thābit said that divorce was in accordance with the status of the man; *ʿidda*, in accordance with the status of the woman. Ibn ʿUmar said that [if] they are both slaves, divorce should be shortened because he is a slave, and the length of time of the *ʿidda* is [shortened] in accordance with her status."

§165 (Same as §148.)

§166 (Same as §155.)



CHAPTER 4

Compilation of Ishāq b. Manṣūr al-Kausaj

On Marriage and Divorce

§1 I said to Abū ʿAbd Allāh Ahmad b. Muḥammad b. Hanbal, may God have mercy upon him, "[What about] the Prophet's saying, 'Consult women upon giving them in marriage.' Can a man give his virgin daughter in marriage without consulting her?"

He said, "I do not like it, but if she is silent and is given in marriage, then rejects the marriage, she has no right to do that. If her father gives her in marriage without her consent, then it is a valid marriage. However, I prefer that the father consult her."

Ishāq said, "It is as he said. Even if a virgin daughter rejects the marriage her father concludes for her, she can be compelled to marry. That [doctrine] has been reported on the authority of the Prophet, and Ibn Abī Lailā adopted it."

I said, "Then the *ḥadīth* of Khansā' bt. Khidhām concerns the *thayyib*?"¹

Ahmad said, "Yes, it does."

I said, "Then the *thayyib* must be consulted. If her father gives her in marriage against her will, is the marriage revoked?"

He said, "Yes. But the marriage is not revoked if a father gives his virgin daughter in marriage without consulting her."

Ishāq said, "It is as he said, because of what the Prophet said about giving the *thayyib* in marriage: He said that she must speak for herself. That is sound."

§2 I said, "If two minors are given in marriage without their con-

¹Here, Kausaj seems to know that the Prophet revoked the marriage contract that Khansā' bt. Khidhām's father concluded for her, but he does not seem to know why. Having ascertained that a father has the authority to give his virgin daughter in marriage, he sees that Khansā' must have been a *thayyib*.

sent, and then come of age, are they given the option [of separating] regardless of whether the husband has had intercourse with his wife?"

Aḥmad said, "If he has had intercourse with her, then he has consented to [the marriage]. But if their fathers did not give them in marriage, then they are given the option [of separating]."

Ishāq said, "It is as he said, unless the husband has had intercourse with his wife before she came to be [of age and hence] in a position to opt for separation."

Ishāq said, "If two fathers give two minors in marriage [to one another], and then they (i.e., the two minors) die, the couple inherit from each other, whereas these rights of inheritance do not exist between them if their fathers did not give them in marriage."²

- 83 Aḥmad said, "I do not think it is up to the *walī* or the *qādī* to give an orphan in marriage until she reaches the age of nine. Once she is nine and consents [to a marriage], she has no further option." He said, "Further, I do not think her husband should have intercourse with her, if she has been given in marriage as a minor—under the age of nine."

I said, "If they [the young husband and wife] die, do mutual rights of inheritance prevail between the two of them?"

He said, "I do not know."

Ishāq said, "It is as he said, and mutual rights of inheritance do not prevail between the two of them."

- 84 Ishāq said, "As for a man who gives his brother's daughter in marriage when she is a minor and then the husband has intercourse with her while she is still a minor, and then she starts menstruating while she is with her husband, and then she says, 'I do not consent,' the *sunna* concerning that is:

"If he has had intercourse with her after she has reached the appropriate age for intercourse, and she has consented [to the marriage], then that is valid. But if she has not menstruated and was delivered to her husband when she was too young for intercourse, that is not lawful. He cannot have intercourse with her at all until she consents. Then he can have intercourse with her. [It is not a question of] whether she has reached the appropriate age. Those who said he could have intercourse with her and that she could end the marriage after that were in error. For he is

²See next response and also AD 28.

not allowed to have intercourse with her until she reaches the age of consent and then have her opt out of the marriage, because she cannot choose herself, having previously consented to the marriage.

"If she has not consented to have intercourse, she cannot be ordered to, and she is returned [to her family] until she menstruates and hence has reached an appropriate age for intercourse. Then when she menstruates, she is returned [to her husband], and she is entitled to a dower from him. Then they can be separated.

"If either of them dies before maturity, they do not inherit from each other, for how can mutual rights of inheritance prevail between them as long as the option prevailed for invalidating the marriage? But they do inherit from each other if the marriage was valid, that is, if their fathers gave them in marriage to each other when they were minors. Then they inherit from each other if one of them dies before reaching maturity since in this case neither of them has the option [of dissolving the marriage], for the marriage was valid. But, whenever relatives other than the father conclude a marriage contract, then the girl can opt to end the marriage when she comes of age. That is also the case if the judge (*qādī*) gives two minors in marriage to each other—they can opt to end their marriage when they are of age."

- 85 I asked Ishāq about the minor orphan given in marriage by her *walī*: "Is her option to dissolve the marriage [an automatic] separation or not? Can her husband have intercourse with her before she is of age? When is she of age? Can she opt before she is of age?"

Ishāq said, "The *sunna* concerning that is that she can opt to end the marriage when she is of age. She is of age when she has reached her ninth year, because at that age she can begin to menstruate and bear children. If her *walī* gave her in marriage and her husband wishes to have intercourse with her before she is of age, he cannot lawfully do so. [He cannot lawfully do so] until she exercises her option whether to remain married or not, and her exercise of this option before she is of age has no legal effect. If one or the other, or both of them die before coming of age, they never inherit from each other. And I do not think it is ever up to a *walī* to give a minor girl, one under nine years of age, in marriage, unless she specifically desires it. In that case she is given in marriage. Then when she is of age she can exer-

cise her option. If she comes of age and chooses herself, she can remarry without the judge's (*hākim*) separating her and her [first] husband. Those who said that the judge had to separate the couple erred, because mutual rights of inheritance did not prevail between them (i.e., their marriage contract had no legal effects)."

86 I said to Aḥmad, "Sufyān said, 'If you consult the *bikr* and then give her in marriage, is she allowed then to say, 'I do not consent?'"

Aḥmad said, "[Yes,] if anyone besides her father gives her in marriage."

[I said,] "Sufyān said, 'If they say to her—"Do not go against our orders, we have given you in marriage," and then she consents, they must conclude a new marriage contract. If they do not [conclude a new marriage contract], but have her stay married on the basis of the [original] one, and later on she says, "I do not consent," she has the right to do that."'

Aḥmad said, "It is as he said, as long as it was not her father [who gave her in marriage]."

Ishāq said, "It is this way, as he said."

87 I said, "Sufyān said, 'Concerning [the case of] a girl who is given in marriage and then says, "I do not consent," the marriage is rejected. If they say to her, "Aren't you ashamed of rejecting our orders?" and she says, "All right, I consent," they must conclude a new marriage contract.'"

Aḥmad said, "[Yes,] this is sound, if she is an orphan without a father."

Ishāq said, "It is this way, as he said."

88 I said, "Sufyān said [the following] about an orphan who has been given in marriage and whose husband has cohabited with her and who has started menstruating while with her husband: 'She is given the right to opt to end her marriage.³ If she chooses herself, the marriage is not upheld, and she has the right to herself. But if she says, "I choose my husband," then that statement should be witnessed and they remain married [on the basis of their original marriage].'

Aḥmad said, "This is sound."

Ishāq said, "As he said."

³Here, the question must assume that a minor girl has been inappropriately given in marriage by a *wali* (not her father) and has been sent to live with her husband. However, the couple have not had intercourse.

89 I said, "Sufyān said [the following] about the *ṭhayyib* when she is given in marriage and laughs or cries or is silent: He said, 'It is not [a] valid [marriage] until she speaks.'"

Aḥmad said, "Yes, [not] until she gives her permission with words."

Ishāq said, "It is as he said in both cases, but her husband should not have intercourse with her before she has started menstruating. Further, if it is known that her laughter is her manner of consenting, then it is like the silence of the *bikr*."

10 I said, "[What] about 'All's doctrine 'No marriage without a *wali*, and when women reach their full maturity their agnates have the right [to give them in marriage]?'"

Aḥmad said, "Yes, [then] their agnates have the right to give them in marriage."

Ishāq said, "We say that when a woman is old enough for intercourse, then her agnates have the right to give her in marriage. Before that, they must not give her in marriage. Rather, only her father can [give her in marriage] before she is of age."

11 I said, "[There is the] *ḥadīth* of Ziyād: '[If] any woman desires a man and her *wali* refuses to marry her to him and the man is her equal, I give them in marriage to each other.'"

Aḥmad said, "If her *wali* has not given her in marriage to the man of her choice and he is her equal, then the judge (*sulṭān*) should give her in marriage to him. Even if her *wali* is her father, but he would not give her in marriage to someone who was her equal, the judge gives her in marriage."

Ishāq said, "It is as he said."

12 I said to Aḥmad, "[What about] Ibn 'Umar's doctrine: 'I forbid the bodies of noble women to any except men who are their equals.'"

Aḥmad said, "Equality in lineage, religion, and means."

I said, "What if a man has lineage and means, but drinks wine?"

He said, "Then he is not a noble woman's equal."

I said, "[If a noble woman is given in marriage to such a man,] is the couple separated?"

He said, "Yes."

Ishāq said, "As he said."

13 I said, "Sufyān was asked about two *walīs* who each give [the same girl] in marriage [to two different husbands] and it is not known which of them gave her in marriage first. Sufyān said, 'If it is known who acted first, she belongs to the first husband.'

However, if it is not known [which *wali* acted first], she is separated from both husbands."

Aḥmad said, "Lots are cast between the two husbands, and she belongs to the one who wins."

Ishāq said, "The matter is decided by lot, as he said."

- §14 I said, "Sufyān was asked about a woman who says to her pre-pubescent brother, 'Give me in marriage,' and he does. Sufyān said, 'He cannot act as a *wali* until he has attained puberty.'

"Sufyān was also asked about the idiot [acting as a *wali*]. He said, 'He cannot act as a *wali*.'"

Aḥmad said, "That is sound."

Ishāq said, "Yes; it is as he said in both cases. [As for the pre-pubescent brother, in order to act as a *wali*,] he must be fifteen years of age, or show signs of pubescent development, or attain puberty. If he meets any of these three qualifications, a marriage concluded by him for his sister is valid, unless he is *fāsiq*.⁴ If it is not known whether he shows [any of these] three signs (e.g., is fifteen, is in the process of pubescent development, or has attained puberty), but it is known that he has reached six spans, such a height counts as one of the three signs."

- §15 I said, "[What if] two *walis* give the same girl in marriage to two different husbands, and the husband to whom she was married second has had intercourse with her?"

Aḥmad said, "The couple are separated, she receives a dower on the basis of the second husband's having had intercourse with her, and she is returned to the [husband to whom she was married] first."

Ishāq said, "It is as he said, for when the first marriage became valid, it was impossible for the second one to be so."

I said, "[What if] two *walis* give a woman in marriage and it is not known which of them gave her in marriage first?"

Aḥmad said, "I do not think either of the marriages is valid."

Ishāq said, "It is as he said, if it cannot be ascertained which marriage was first."⁵

- §16 I said, "Sufyān was asked about a woman whom a certain man converts to Islam. [He was asked whether] that man can marry her himself? Then he related to me on the authority of Ibn Sirīn

that Ibn Sirīn did not see any harm in it, but al-Hasan used to say, 'No, [he cannot just marry her himself,] he must get the judge (*sulṭān*) [to give her in marriage to him.]'"

Aḥmad said, "A woman cannot give herself in marriage, until she makes a man her *wali* so that he can give her in marriage, in accordance with the *ḥadīth* of al-Mughīra b. Shu'ba."

Ishāq said, "It is as he says, for if she makes [a certain man her *wali*] the marriage [he concludes for her] is valid."

I said, "Is this the *ḥadīth* of al-Mughīra b. Shu'ba's that he ordered another man to give him in marriage to a woman whom he (i.e., al-Mughīra) had the right to give in marriage?"

Aḥmad said, "We agree with it (*ḥadhāliha naqīlu*)."

Ishāq said, "It is as he said. But if a man marries her (i.e., the woman he has a right to give in marriage) and the marriage is properly witnessed, then it is a valid marriage, because [if] he gives another man permission to conclude the marriage, concluding it himself amounts to the same thing."

- §17 I said, "It is said that agnates are in charge of women's bodies and testators are in charge of their wealth."

Aḥmad said, "That is sound."

Ishāq said, "As he said."

I said, "Who then [among her agnates] has the right to give a woman in marriage?"

Aḥmad said, "[In the following order:] her father, her son, her brother, her brother's son, her paternal uncle; if she has both a brother and a grandfather, I prefer the grandfather. If she has a grandfather and a son,⁶ I prefer the son."

Ishāq said, "All of it is as he said, except the son has preference over the father. If the father has a brother and brothers-in-law, or the father and the mother [each] have a paternal uncle, then the father's relatives take precedence in giving [a woman] in marriage. The nearer of two *walis* errs if he does not lay claim to the exercise of his authority [to give a woman in marriage]. However, if [the further of the two] has given her in marriage to an equal, his doing so is not revoked, according to what the Prophet said: 'If two *walis* give a woman in marriage, then the marriage contract concluded by the first [is upheld].' Each of the people we have described is a *wali*, but if one of them is nearer than the other, precedence is given to the nearer in terms of rights of inheritance, and the nearer *wali* continues to be designated as the *wali*. That happens (i.e., the first marriage

⁴*Fāsiq*, "sinner," is someone who has transgressed the law and whose testimony, therefore, has no legal weight. See *El*, s.v. "*Fāsiq*." See Shāfi'i, *Umm*, 5: 14–15, for moral qualifications of a *wali*.

⁵But see above, 1K 13.

contract is upheld), because it does not say in the Prophet's *ḥadīth* about two *walīs* which of them is the nearer, and each of them is a *walī*. Mālik b. Anas and those who followed him held this."⁶

§18 I said, "What if a woman marries without the permission of her *walī* and he gives permission after that?"

Aḥmad said, "I prefer that a new marriage contract be concluded."

Ishāq said, "It is as he said, but if her *walī* does in fact validate the marriage, it is valid, because of what 'Alī b. Abī Ṭālib did when such a case was brought to him, [according to] the *ḥadīth* of Bint Hānī, whose mother gave her in marriage. 'Alī declared the marriage valid without insisting on a new contract. And 'Alī, at that time, was caliph. So every marriage of this kind (i.e., concluded without a *walī*) is suspended until it is declared valid by either the *walī* or the judge (*sulṭān*)."

§19 I said, "What if a man marries a woman without her *walī*'s permission and then divorces her?"

Aḥmad said, "To be prudent on her behalf (*aḥṭaṭu lahā*), I make the divorce valid."

Ishāq said, "Whenever a man divorces his wife after he has married her without a *walī*, the divorce is not valid, and rights of inheritance do not prevail between husband and wife. There is no doubt of that, because the Prophet said their marriage was triply void (*bāṭil*). And something that is void is not valid (*mun-fasikh*), so does not need to be declared invalid by the judge (*hā-kim*) or anybody else. But if the matter should be referred to the judicial authority, he can rule on its lack of validity, which is best.

"Marriage during an *idda* is invalid (*ḥarām*) too. Such a case was brought to 'Umar b. al-Khaṭṭāb, and he separated the couple. Does anyone doubt that a marriage concluded during a woman's *idda* is invalid (*lā yathbutu*)? How did 'Umar separate the couple? He said, 'They are separated from each other,' because he wanted to let everyone know that they were not married."

I said, "[What if] a man marries a woman during her *idda*?" Aḥmad said, "This case is not like that one [in which a woman married without a *walī*]. If a man divorces a woman [he married during her *idda*], the divorce has no legal effect."

Ishāq said, "Whenever a man marries a woman without a *walī*

⁶For discussion of the Mālikī position, see Malik, *Mudawwana*, 2:171–172.

and then divorces her, it does not count as a divorce, ever. And during the *idda*, it is as he said."

§20 I said to Aḥmad, "Is the dower what the parties mutually agree upon?"

Aḥmad said, "That is what we say."

I said, "What about someone who says to a man, 'I will give her in marriage to you for a dower of what you know of the Qur'ān?'"

He found that reprehensible and said, "People say, 'For what he can teach her [of the Qur'ān], and give her in marriage for this (i.e., what he can teach her), but it is not in the *ḥadīth*.' He said, 'The dower is what the parties mutually agree on.'"

Ishāq said, "As he said, but if a man marries a woman for a dower of what he knows of the Qur'ān, then the marriage is valid, and he is giving her a dower in accordance with what the Prophet established as *sunna*."

I said, "What if a man marries a woman on the basis of a dower that she stipulates (*alā ḥukmihā*)?"

Aḥmad said, "We say what 'Umar said to al-Ash'ath—that she can stipulate only the fair dower for women of her status; no more, no less."⁷

Ishāq said, "Whenever a man marries a woman for a dower she stipulates, she can receive what the Prophet established as his *sunna* for his daughters and wives, and that is 480 dirhams."

§21 I said, "Can a husband have intercourse with his wife before giving her any of her dower?"

Aḥmad said, "Yes."

I said, "On the basis of whose *ḥadīth* do you say this?"

He said, "The *ḥadīth* of Khaithama." He [also] adduced as proof the *ḥadīth* of Barwa' bt. Wāshiq.⁸

Ishāq said, "As he said."

§22 I said, "If a man wants to marry a woman, should he see her beforehand?"

Aḥmad said, "There is no harm in that, as long as he does not see any aspect of her that only her husband or other close relatives ought to see."

⁷This question is about a *tahkim* marriage, in which fixing the dower is left to the judgment of either the husband or the wife. See Russell and Suhrawardy, #202 and notes, for possible ramifications.

⁸However, in the story of Barwa' bt. Wāshiq, her husband died before having intercourse with her.

Ishāq said, "As he said, because the Prophet said, 'If God has affected a man's heart so that he wishes to marry a certain woman, then there is no harm in his seeing her, without her knowing, to the extent that she is not harmed.'"

923 I said, "[What if] a man marries a woman and fornicates before having intercourse with her?"

Aḥmad said, "They are not separated."

I said, "On the basis of whose *ḥadīth* do you say that?"

Aḥmad said, "The *ḥadīth* of 'Ubaid Allāh b. Abī Yazīd on the authority of his father on the authority of 'Umar."

Ishāq said, "Just as he said. 'Umar wanted the young man in question to marry the woman with whom he had fornicated, but he refused.'"

924 I said, "What if a man marries a woman and then finds out that she is mad, or has elephantiasis or leprosy, but he does not say anything?" I said, "Do we follow the *ḥadīth* of 'Umar and 'Alī?"

Aḥmad said, "I do not know."

I asked him again another time, and he said, "I know only that he has recourse against her *wali*."

I said, "And do you separate them?"

He said, "Yes."

Ishāq said, "The *sunna* concerning that is 'Umar's doctrine about the four flaws, unless the husband has had intercourse with his wife. If he has, then she remains his wife."⁹

925 I said, "What if a man marries a woman who is a *bikr*, as well as a woman who is a *thayyib*? What about the opposite case?"

Aḥmad said, "The man should stay with the *bikr* seven nights, then with the *thayyib* three, then go back to the *bikr*."

⁹For the variety of opinions on the legality of marriage after fornication, see Schacht, "Adultery as an Impediment to Marriage," pp. 115–117. Ibn Hanbal and Ibn Rāḥwayh use a different *isnād* here to support what Schacht refers to as "the ancient Kufan doctrine."

Schacht also points out that the Kufans held that a man could lawfully marry a woman with whom he has previously fornicated. He refers to Abū Yūsuf, *Kutāb al-āthār* #603, in which 'Alqama, told of a man who had fornicated with a woman and then married her, recites verse 42:25: *And He it is Who accepteth repentance from his bondmen, and pardoneth the evil deeds and knoweth what ye do.* In #604, Ibn 'Abbās, told of the same, or a similar couple, is reported to have said, "The beginning of this is fornication; the end is marriage." Below, in IK 43, Ibn Hanbal and Ibn Rāḥwayh both think it lawful for a couple who have fornicated with each other to marry.

¹⁰See Spector, p. 464, for a discussion of this response. For 'Umar's doctrine that the husband must take action to end such a marriage before he has intercourse with his wife, see Mālik, *Muwatta'*, 3: 130.

Ishāq said, "As he said."¹¹

926 I said, "What about a man marrying Jewish and Christian women?"

Aḥmad said, "There is no harm in it."

I said, "What about a Magian woman?"

He said, "No, I prefer that he marry only Christian or Jewish women."

Ishāq said, "As he said. Magian women are not lawful."

I said, "Should a man marry a Muslim slave?"

Aḥmad said, "Yes, if he is afraid of committing fornication."

Ishāq said, "As he said, whenever a man is afraid of committing fornication, he should marry a Muslim slave. Further, he should marry her if he fears committing fornication with either a free or a slave woman."

927 I said, "What if a man who already has a slave wife marries in addition a free woman?"

Aḥmad said, "That means a divorce for the slave."

I said, "In accordance with whose *ḥadīth* do you say this?"

He said, "In accordance with the *ḥadīth* of Ibn 'Abbās."

Ishāq said, "As he said, exactly."

928 I said, "[What about] a man who is a slave married to both a female slave and a free woman?"

Aḥmad said, "He allocates two days to the free, and one day to the slave woman, [in accordance with] the *ḥadīth* of Ibn Abī Lailā on the authority of al-Minhāl on the authority of 'Abbād on the authority of 'Alī."

Ishāq said, "As he said, the same."

929 I said, "Should a man marry Christian or Jewish slave women?"

Aḥmad said, "No, he should not."

Ishāq said, "Most definitely not."

930 I said, "What if a man marries two sisters by means of one marriage contract?"

Aḥmad said, "He must choose one of them."

Ishāq said, "As he said."

931 I said, "What if a man marries a free woman and a slave by means of one contract?"

Aḥmad said, "His marriage with the free woman is valid, and he separates from the slave."

Ishāq said, "As he said."

¹¹For one discussion of a man's dividing his time between his wives, see Mālik, *Muwatta'*, 2: 268–272.

- §32 I said, "Is it reprehensible for a man to be married to two of his paternal cousins?"
 Ahmad said, "I do not find it reprehensible, but al-Hasan did."
 Ishāq said, "It is reprehensible because it is improper (*li'l-ta-fāsuḥ*), but not because it is forbidden (*li'l-tahrīm*)."¹²
- §33 I said, "How long should a man be away from his wife?"
 Ahmad said, "Six months."
 Ishāq said, "Six months is correct."
 Ahmad said, "Then the husband is written to and if he refuses to return, the judge (*qāḍī*) separates the couple from each other."
 Ishāq said, "The [wife's] *walī* writes after two years [saying], 'Either you return, or you will be separated.' Then if he returns, [fine]; but if not, he is separated from his wife."
- §34 I said, "[What if] a man marries a woman, but does not have intercourse with her and says over the period of a month, 'I will have intercourse with her tomorrow? Is he forced to have intercourse with his wife?'"
 Ahmad said, "I follow [the doctrine of waiting] four months. Then, if he has not had intercourse with her, the couple are separated."
 Ishāq said, "That is best."
- §35 I said, "What if a man gives his daughter or his sister in marriage and stipulates [in the contract] that there be something for himself?"
 Ahmad said, "Only the father can do that."
 I said, "Is that because the father has full ownership of his children's wealth and takes from it what he wishes?"
 Ahmad said, "Yes."
 Ishāq said, "It is as he said; only the father can stipulate something for himself."
 I said, "[Can a man] stipulate in a marriage contract that his daughter is entitled to a certain amount if her husband [ever] expels her from her house, or something like that?"
 Ahmad said, "A stipulation can be made for her."
 Ishāq said, "It is as he said, in accordance with 'Umar's doctrine—correct decisions about rights are achieved through stipulations and in accordance with the Prophet's doctrine: 'The best stipulation is the one by means of which you can fulfill your lawful obligations as husbands.'"
- §36 I said, "Does a slave marry without his master's permission?"

¹²See IK 49 for an explanation of what is forbidden.

- He [Ahmad] said, "In accordance with Ibn 'Umar's doctrine, he [thereby] commits fornication."
 I said, "What if the master validates the marriage after that?"
 He said, "There should be a new contract."
 Someone said to him, "Should the slave be flogged?"
 He said, "According to Ibn 'Umar's doctrine, yes, but there is the *ḥadīth* of Abū Mūsā."
 I said, "Then she (i.e., the wife in question) is not entitled to a dower, and she need not wait an *'idda*?"
 He said, "This is Ibn 'Umar's doctrine." [But he said it] as if he inclined toward the *ḥadīth* of Abū Mūsā.
 Ishāq said, "We prefer that there be a new marriage contract, and that he not be given the *ḥadd* punishment of flogging. But, if the master validates the marriage, it is valid (i.e., without a new contract). If the slave has had intercourse with the wife, then she must wait an *'idda* and she receives a dower."
- §37 I said, "Ibn 'Abbās gave his female slave in marriage to his male slave without a dower."
 Ahmad said, "It would have been appropriate (*ḥasan*) if he had provided a dower [for their marriage], but even though he did not, it was still valid."
 I said, "Were witnesses required for such a marriage?"
 Ahmad said, "That would have been best."
 Ishāq said, "The same as he said, except there must be witnesses."
- §38 I said, "Can a slave take a concubine?"
 Ahmad said, "Yes."
 Ishāq said, "As he said, because Ibn 'Umar and Ibn 'Abbās both said that [a slave could]."
- §39 I said, "How long is the *'idda* of the divorced female slave?"
 Ahmad said, "If she menstruates, then two menstrual periods. If she does not, then two months. Her *'idda* if she is widowed is two months and five days."
 Ishāq said, "Exactly as he said."
- §40 I said, "How many times does a slave divorce a free woman and how long is his *'idda*?"
 Ahmad said, "Divorce is for men and *'idda* for women."
 I said, "Does a free man divorce a female slave triply and then that woman wait an *'idda* of two menstrual periods?"
 Ahmad said, "Yes."
 I said, "Does a slave man then divorce a free woman doubly and that woman wait an *'idda* of three menstrual periods?"
 He said, "Yes."

- Ishāq said, "As he said."
- §41 I said, "What if a man marries a woman and he is already married to her maternal or paternal aunt?"
 Ahmad said, "The couple are separated."
 Ishāq said, "It is as he said, because of what is correctly related on the authority of the Prophet and that is why 'Umar b. al-Khaṭṭāb separated [such a couple]. He followed the Prophet's doctrine."
- §42 I said, "To how many women can a slave be married?"
 Ahmad said, "Two."
 Ishāq said, "As he said."
- §43 I said, "What if a man marries a woman with whom he has previously committed fornication?"
 Ahmad said, "If she has repented, there is no harm in his marrying her."
 Ishāq said, "As he said, if they have each repented."
 I said, "What if a man kissed his wife before marrying her, or fornicated with her?"
 Ahmad said, "If he has fornicated with her, I prefer that he separate from her, but if he has kissed her, then he should not separate from her."¹³
 I said, "Whose *ḥadīth* is that?"
 He adduced as proof the *ḥadīth* of Ibn Zam'ā [which says], 'If he has fornicated with her.' He added, "You do see, do you not, that the Prophet said to Sauda, 'Seclude yourself from him,' thus affirming kinship to 'Utba, kinship resulting from fornication?"
 Ishāq said, "It is as he said, except for his giving proof with [the *ḥadīth* of] 'Abd b. Zam'ā and 'Utba; for it is not clear that this *ḥadīth* concerns the question [under discussion]."
 Ahmad said, "If a man has fornicated with a woman, he cannot marry her mother or her daughter. As for sexual activity other than intercourse, whatever is forbidden does not forbid whatever is lawful."
- §44 I said, "Sufyān said about a man who kisses his daughter lustfully, thinking she is his wife, that his wife is forbidden to him."
 Ahmad said, "Personally, I do not forbid such a man his wife, unless he has actually had intercourse [with his daughter]."
- §45 I said, "Sufyān was asked about a man who knowingly marries a woman within the forbidden degrees, and he said, 'I do not

¹³ A temporary separation for purposes of punishment and repentance? See above, IK 23.

- think such a man receives a *ḥadd* punishment; rather a *ta'zīr* punishment."
- Ahmad said, "How repulsive this doctrine must be to God!"
 I said, "Don't we say he should be killed?"
 Ahmad said, "He is killed if he did it intentionally."
 Ishāq said, "It is the same as Ahmad said."
- §46 I said, "A man marries a woman, then divorces her before having intercourse with her. Can he marry her mother or her daughter?"
 Ahmad said, "As for the daughter, he can marry her; as for the mother, she is forbidden."
 Ishāq said, "As he said."
 Ahmad said, "If a man marries a woman and then she dies, there is no harm in his marrying her daughter. There are those who find it reprehensible, though, because of the question of inheritance. If a man divorces his wife, he can marry her daughter, but not her mother. In fact, a man can never marry his wife's mother, regardless of whether he has divorced his wife, or she has died."
- §47 I said, "A man marries a woman and then she dies before he has intercourse with her. Zaid b. Thābit said he could not marry her mother or her daughter."
 Ahmad said, "Zaid b. Thābit found it reprehensible because of the question of inheritance. However, if a man divorces a woman he can marry her daughter, since he inherits from her if she dies."
 I said, "Whose *ḥadīth* is this?"
 He said, "Zaid b. Thābit's."
- §48 Ahmad said, "Three women are forbidden. God said, *Marry not those women whom your fathers married* (4:22), and He said, *And the wives of your sons who (spring) from your own loins* (4:23), and He said, *And your mothers-in-law* (4:23). So if a man marries a woman, neither his son nor his father can marry her, regardless of whether he has had intercourse with her, because He said, *And the wives of your sons who (spring) from your own loins*. If a man marries a woman, he cannot marry her mother, even if he has not had intercourse with his wife, because He said, *And your mothers-in-law*. But there is no harm in a man's marrying a daughter of his wife's if he has not had intercourse with her mother—whether the wife died or he divorced her, because of His saying, *But if ye have not gone in unto them, then it is no sin for you (to marry their daughters)*" (4:23).

§49 I said to Ahmad, "What about *mu'a* marriage? Do you say it is forbidden (*ḥarām*)?"

He said, "I prefer that it be avoided."

Ishāq said, "It is *ḥarām* without doubt, because of its being prohibited (*nahyuhu*) and then made forbidden (*tahrimuhu*) after it was made lawful (*ihlāluhu*). And it invalidates the *ʿidda*, inheritance, and divorce, even though the *mu'a* marriage may have been concluded with a *wali*, witnesses, and a public announcement of it for its specified time. Ibn ʿAbbās used to say, *And those of whom ye seek content (by marrying them), for a stipulated period, give them their portions as a duty*" (4:24).¹⁴

§50 I said, "[What about] being married to two slave sisters at the same time? Do you say it is forbidden (*ḥarām*)?"

Ahmad said, "I do not say that it is forbidden (*ḥarām*), but I do say that it is prohibited (*yunhā ʿanhu*)."

Ishāq said, "It is forbidden (*ḥarām*) because of His saying, *And (it is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature) in the past* (4:23). That is, Leah and Rachel. Jacob was married to both of them at once."¹⁵

§51 I said, "[What about] a free man who repudiates his slave wife by *qadhf*?"

Ahmad said, "He institutes *liʿān* proceedings against her."

I said, "Can a slave man repudiate his free wife by means of *qadhf*?"

He said, "By means of *liʿān*. Each of these husbands can repudiate [his wife] by means of *liʿān*."

Ishāq said, "It is as he said. If a woman can be called a spouse, then her husband can repudiate her by means of *liʿān*."

§52 I said, "Who has the right to the custody of a young child?"

¹⁴In this and the following response, Ibn Hanbal and Ibn Rāhwayh refer to a distinction Shāfiʿi explains in 7:291–292. See also Majid Khadduri, *Islamic Jurisprudence: Shāfiʿi's Risāla*, pp. 173–178. To summarize Shāfiʿi's argument, whatever is prohibited by the Prophet is absolutely forbidden, unless there is some indication (*dalāla*) in the Prophet's *sunna* that it is permissible in certain circumstances and not in others. Ibn Hanbal is unwilling to give the historical development of the doctrine of *mu'a* marriage; Ibn Rāhwayh, although he says *mu'a* is now completely forbidden (and therefore as an invalid contract it has no legal effects), reveals its connection with Qurʾān 4:24 in Ibn ʿAbbās's codex by quoting the additional phrase *for a stipulated period*. For Ibn ʿAbbās's codex, see Jeffery, 193–208. For 4:24, see 197.

¹⁵Ibn Hanbal here makes a distinction between the specific prohibition in the Qurʾān against marrying two sisters and the logical extension of this prohibition to slave wives. Ibn Rāhwayh ignores this distinction.

For the life of the patriarch Jacob, see *El*, s.v. "Yaʿkūb."

Ahmad said, "His mother, until he grows older; then he is given the right to choose for himself."

I said, "What if the woman has a bad character (*zālīma*)? Can the husband take a young child from her?"

He said, "No, she is sinful in what she does, but she has the right to her child, as long as he is young."

Ishāq said, "It is the same as he said."

I said to Ishāq, "When should the child choose?"

Ishāq said, "When he is seven years old is a good time."

§53 I said to Ahmad, "Is the *ilāʾ* of the slave valid?"

He said, "Yes, and his *ilāʾ* is four months, for God said, *Those who forswear their wives* (2:226), and He did not mention slaves or Jews or Christians."

Ishāq said, "The *ilāʾ* of the slave is two months, because everything he does in the field of divorce and *ʿidda* is one-half [that of the free person]."

§54 I said, "What is the length of time of the *ʿidda* of the *umm al-walad*?"

Ahmad said, "She waits an *ʿidda* of one menstrual period if her master dies; and the *mudabbara* also waits an *ʿidda* of one menstrual period."

Ishāq said, "She (i.e., the *umm al-walad*) waits a regular widow's *ʿidda*. If she is being manumitted, she waits an *ʿidda* of three menstrual periods, as a precautionary measure (*ʿalā al-ihṭiyāʾ*). The *mudabbara* waits an *ʿidda* of one menstrual period, as he said."

§55 I said, "Do you think if an owner gives his *umm al-walad* in marriage to a second man, the new owner should wait an *istibrāʾ* on her account?"

Ahmad said, "Has the first owner been having intercourse with her?"

I said, "Yes."

He said, "Yes, [the new owner should wait an *istibrāʾ*]."¹⁶

Ishāq said, "As he said."

§56 I said, "What if an owner gives his female slave in marriage to another man and it becomes clear, in less than six months, that she is pregnant?"

Ahmad said, "This is not a marriage, and the child belongs to the [first] owner. Further, if the second man has had intercourse with her, she is entitled to a dower, as she would be if someone had married her during her *ʿidda*, and she is returned to her owner."

Ishāq said, "It is as he said."

I said, "[What if such] a woman gives birth in six months?"

Ahmad said, "If she gives birth a full six months after her marriage, then the child belongs to the husband. But if she gives birth in less than six months, then the child belongs to her [first] owner."

I said, "Suppose a woman has a baby several years later [after her owner has stopped having intercourse with her]?"

Ahmad said, "As long as she has not married, the child belongs to her owner. The Madinese scholars say four years [is the appropriate time limit]. Ibn 'Ajlān's mother bore him three years after [she had had intercourse with his father].

"If a woman is divorced, and she confirms that her *'idda* has ended, and [if] then she remarries and delivers a child within six months, normally, the first [husband] claims it. Otherwise, [if she delivers in more than six months], the child belongs to the second [husband], because he is the one with whom she has been having intercourse."

I said, "[What if] a woman gives birth after two years?"

Ahmad said, "The child belongs to her [most recent] husband [or owner]. If he denies the child is his, then he should institute *li'dān* proceedings against her. The Madinese give a time limit of four years."

Ishāq said, "All is as he said."

§57 I said, "What if two men share the ownership of a female slave, and one of them has intercourse with her?"

Ahmad said, "He does not receive a *ḥadd* punishment. Ibn 'Umar said it was permissible."

Ishāq said, "As he said."

I said, "Does it make a difference whether he has intercourse with her knowing, or not knowing [that he has only part ownership of her]?"

Ahmad said, "Not knowing is worse, but he still does not receive a *ḥadd* punishment because he has a share in her."¹⁶

I said, "Like someone who steals from the treasury and does not receive a *ḥadd* punishment?"

He said, "Yes."

§58 I said, "Ibn 'Abbās does not think a slave, a Jew, or a Christian should receive a *ḥadd* punishment."

Ahmad said, "They all receive *ḥadd* punishments."

¹⁶ 16. See Mālik, *Mudawwana*, 6:205, for the same case. Mālik agrees that the man does not receive a *ḥadd* punishment.

Ishāq said, "That is correct."¹⁷

§59 I said, "[What if] a man commits adultery with his wife's sister?"

Ahmad said, "His wife is not forbidden to him, but he does not have intercourse with her again, until her sister has waited an *'idda*."

Ishāq said, "It is as he said."

§60 I said, "[What if] a man says to a second that it is lawful for the second to have intercourse with his female slave? Or [what if] a woman says to her husband that he may have intercourse with her female slave? Would you say that was forbidden?"

Ahmad said, "There is the *ḥadīth* of al-Nu'mān b. Bashīr on the authority of the Prophet in which the Prophet had said to such a woman, 'If you give him permission, we will flog him.'"

I said, "This is a case of a wife giving her husband permission [to have intercourse with her female slave]. What do you say about a man giving his female slave to a second man?"

Ahmad said, "It is not appropriate. The second man should not have intercourse with the first one's female slave."

Ishāq said, "As he said in both cases."¹⁸

§61 I said, "What about a man who has intercourse with his wife's female slave, or his mother's or father's female slave?"

He [Ahmad] said, "In each of these cases he does not receive a *ḥadd* punishment, except in the case of his wife's female slave—there is the *ḥadīth* of al-Nu'mān b. Bashīr on that."

I said, "Is a *ḥadd* punishment called for in the case of the man who has intercourse with his wife's female slave?"

Ahmad said, "Yes, in accordance with what al-Nu'mān said."

Ishāq said, "As he said."

§62 I said, "What about a man who marries a female slave and then waits an *istibrā'* on her account?"

Ahmad said, "He can have intercourse with her on the basis of his ownership."

I said, "Suppose she bears his child before he waits the *istibrā'*? Can he sell her if he wishes?"

¹⁷ Since slaves, Jews, and Christians cannot have the quality of *ihṣān*, their *ḥadd* punishment for fornication or adultery would be flogging.

¹⁸ See Ibn Hanbal, *Muwad*, 4:272, for this story: A man, brought before al-Nu'mān b. Bashīr, said that his wife had said her female slave was lawful to him. Nu'mān said he would judge as the Prophet would in a similar case: The man is flogged one hundred strokes if his wife [mistakenly] made the slave available to him. He is stoned if he had illicit sexual relations with the slave on his own initiative.

He said, "Yes."

Ishāq said, "As he said."

§63 I said, "What is *talāq al-sunna*?"

Aḥmad said, "That a man divorce his wife during a period of purity, without having had intercourse with her, as the Prophet ordered Ibn 'Umar to—to divorce his wife, in a period of purity, without having had intercourse with her. The question of single, double, or triple divorce is not part of it (i.e., of the definition of *talāq al-sunna*)."

Ishāq said, "As he said."

Aḥmad said, "If a man says to his wife, 'You are triply divorced according to the *sunna*,' and he says this while she is menstruating, his statement has no legal effect upon her. However, if she has entered upon a period of purity, then she is in fact triply divorced, because he has pronounced the divorce during the time in which the Prophet ordered Ibn 'Umar to. The Prophet did not specify single, double, or triple divorce; therefore a triple divorce pronounced during a period of purity is valid."

Ishāq said, "In every period of purity, it is possible for a woman to be divorced. A divorce pronounced during a menstrual period has no legal effect on a woman."

§64 I said, "Can a man have intercourse with his *mudabbara* slave?"

Aḥmad said, "Yes, he can."

I said, "If she gives birth during [her period of] *tadbīr*, are her children in the same position as she, namely manumitted with her manumission and slaves with her slavery?"

He said, "Yes."

Ishāq said, "As he said."

§65 I said, "[What if] a man divorces his wife singly but means to divorce her triply?"

Aḥmad said, "It is a single divorce."

I asked him again, and he said, "It is a single divorce."

Ishāq said, "As he said, unless the man says, 'Wait an *'idda*,' and he means by this statement a triple divorce."

Aḥmad said, "It is a single divorce."

I asked him yet again, and he said, "It is a single divorce."

Ishāq said, "If he means a triple divorce, then it is triple."

I said to Aḥmad, "[What about] a man who says to his wife, 'Wait an *'idda*,' three times?"

He said, "If he means a triple divorce, then it is triple."

Ishāq said, "Exactly as he said."

I said, "What if a man says to his wife, 'Go, marry whom you wish?'"

Aḥmad said, "If he meant to divorce her [with this statement], then I am afraid it constitutes a divorce."

Ishāq said, "If he meant a divorce by saying this, then it is as he meant it, either a single, double, or triple divorce."

I said, "What if he says, '*Bahishtam*' (i.e., I relinquish)?"

Aḥmad said, "I ask him what he meant, and if he meant a triple divorce, then it is triple. Every statement in Persian must be interpreted in accordance with the intention of the speaker, because a statement in Persian does not have the precision that one in Arabic does."

Ishāq said, "It is as he said, except the legal judgment for one speaking in Persian is the same as it is for one speaking in Arabic. This will hold true in all cases."

§66 I said, "How does one divorce a pregnant woman?"

Aḥmad said, "A man can divorce his pregnant wife singly whenever he wants to."

Ishāq said, "As he said."

I said, "[What if] she miscarries, does that [automatically] end her *'idda*?"

Aḥmad said, "Yes, if it is certain that she has had a miscarriage."

Ishāq said, "It is as he said, whenever it is clearly a miscarriage."

§67 I said, "What about saying '*in shā' Allāh*' in a divorce statement?"

Aḥmad said, "I do not allow it. As a rule a woman is considered to be divorced if '*in shā' Allāh*' is added to the divorce statement, and the same is true in cases of statements of manumission. That is because divorce is not an oath in which *istithnā* is relevant."

Ishāq said, "Neither divorce nor manumission occurs if statements proclaiming them include the words '*in shā' Allāh*,' because since these statements are not oaths, the intention of the speaker is what makes them valid, and statements that include the words '*in shā' Allāh*' have a clear meaning (*bayān bayyin*)."

I said, "What if a man says, 'You are divorced *in shā' Allāh*?'"

Aḥmad said, "I do not allow it."

I said, "What if he says, 'If I enter this house, then my wife is divorced *in shā' Allāh*?'"

Aḥmad said, "That is an even easier question. I do not allow it."

I said, "Why?"

He said, "Because I do not think it is sound. Do you think that if a man divorces his wife, he can then expiate his oath and re-

turn to his wife? Do you not see that a divorce statement is not an oath?"

Ishāq said, "The *istihna* is valid in both statements."

I said, "Do you think if he says 'If I enter this house,' it is up to him to prove [that he did or did not enter the house]?"

Aḥmad said, "If he enters it, then he has violated his oath and he must expiate it, according to our position."

Ishāq said, "It is as he said, but I prefer for the expiation of oaths, feeding sixty poor."

Aḥmad said, "If he says his wife is divorced if he enters the house, has he not made his wife a condition of his oath? Sufyān did not say anything about this."

Ishāq said, "It is lawful for him [to make a statement including] *istihna*."

§68 I said, "What if he says 'What God has made lawful to me is forbidden to me'?"

Aḥmad said, "Then he must carry out an act of expiation for *zihar*."

I said, "What if he then says, 'I did not mean my wife'?"

Aḥmad said, "Even if he did not mean his wife, she is what God has made lawful for him, and he must carry out an act of expiation for *zihar*."

Ishāq said, "He must be asked about his intention. If he intended an oath, then it is an oath. But if he intended a divorce, then it is a divorce. If his intention cannot be ascertained, then what he said most resembles an oath [and therefore it should be treated as such]."

§69 I said, "Can a man divorce his wife when she is pregnant with twins?"

Aḥmad said, "As long as she has not delivered the second [he can divorce her]."

Ishāq said, "As he said."¹⁹

§70 I said, "What about the divorce of the man in a state of intoxication?"

Aḥmad said, "I do not say anything about it."

He was asked about [the divorce of] the intoxicated man repeatedly, while I watched, but he would say, "I do not say anything about it." Then I asked him, saying, "What if the intoxi-

¹⁹This question concerns reckoning the divorced wife's *idda*. If she is pregnant with twins and her husband divorces her while she is pregnant, her delivery of the second twin ends her *idda*. However, if he divorces her just after they have both been born, her *idda* is reckoned in terms of months or menstrual periods.

cated man divorces, or kills, or steals, or fornicates, or acts aggressively, or buys, or sells?"

Aḥmad said, "I avoid [saying anything about] it. As far as I am concerned, nothing sound has been related to me (*lā yaṣihhu li shay'un*) on the question of the intoxicated man."

Ishāq said, "Whenever the intoxicated man divorces [his wife] and he is irrationally intoxicated, then his divorce has no effect. His wife need not believe him, for he was not rational. When she is in doubt about [the legal effect] of his behavior, she must refer the matter to the judge (*qāḍī*); then if the judge does not find him [irrational], his [divorce] action is valid."

Ishāq said, "As for the divorce of the intoxicated man, what we think is that if his irrationality stems from his intoxication when he divorces or manumits, then he is reminded. If he does not remember [his actions], they are not valid and he is still in custody of his wife. And if he is intoxicated but somewhat rational and is reminded that he has divorced and remembers, then the divorce is valid."

§71 I said, "What about the validity of the divorce of the person who is compelled [to divorce]?"

Aḥmad said, "I do not think it has legal consequences for him, and he is at the point of compulsion if he fears being killed or severely beaten."

Ishāq said, "It is as he said, without doubt."

§72 I said, "What about the divorce of the minor youth?"

Aḥmad said, "If he is mentally mature [it is valid]."

Ishāq said, "As long as he has not matured, or reached the age of fifteen, or shown signs of pubescent development [he cannot divorce]."

§73 I said, "[What] if a man divorces his wife and specifies a future date on which the divorce is to take effect?"

Aḥmad said, "She is his wife until that date."

Ishāq said, "It is as he said."

§74 I said, "Can women be witnesses in divorce cases?"

Aḥmad said, "It is not permissible in divorce cases."

Ishāq said, "As he said, if there is not also a man [as a witness]. But if there is a man and two women, that is permissible. However, it is not permissible to have four women."

§75 I said, "Does a [triple] divorced woman leave her house?"

Aḥmad said, "In accordance with the *ḥadīth* of Fāṭima bt. Qais, she does, and, also in accordance with this *ḥadīth*, she receives neither lodging nor maintenance."

Ishaq said, "It is as he said."

I said, "Does a widow leave [her house]?"

Ahmad said, "She does not, in accordance with the *hadith* of Furai'a."

Ishaq said, "As he said."

§76 I said, "[What about] the divorced woman who starts her third menstrual period?"

Ahmad said, "For the most part, on that question there is the doctrine of Zaid and the Madinese."

I asked him [again] after that. I said, "What if the divorced woman starts her third menstrual period?"

He said, "I do not know what I would choose."

I asked him yet again, and he said, "There is what we know on the authority of [various] *hadiths*," but he did not venture to give a *fatwa* about her.

Ishaq said, "As long as she has not performed her ablutions [to indicate the end] of her third menstrual period, she has not separated from her husband, and he has the right to return to her.²⁰ But if she has delayed her ablutions after her menstrual period has ended, she is divorced from him [anyway]. Performing ablutions with sand (*tayammum*) can be substituted for performing them with water."

§77 I said, "A man who has four wives divorces one of them. Can he remarry during her *'idda*?"

Ahmad said, "He cannot marry a fifth wife until the *'idda* of the one whom he has divorced is completed. If, however, she dies, then he can marry."

Ishaq said, "It is as he said."

§78 I said, "What if the door has been locked and the curtain has been drawn?"

Ahmad said, "Then both a dower and an *'idda* are required for the bride."

Ishaq said, "As he said, unless the woman in question is menstruating, or she is a woman within the forbidden degrees, so that absence of intercourse cannot be attributed to the man."

§79 I said, "What if a man divorces his wife before having intercourse with her and makes it a single divorce?"

Ahmad said, "She is definitely divorced (*hānat*) from him, and [if he wishes to remarry her], he seeks her hand just like any other suitor."

²⁰ Many traditions say an *'idda* counted in terms of menstrual periods is over as soon as the third period starts; others support Ibn Rāhwayh's view.

Ishaq said, "As he said."

Ishaq said, "The *sunna* concerning a man who divorces his wife while terminally ill and before having intercourse with her is that mutual rights of inheritance prevail between the couple. This is the case regardless of whether there has been intercourse, in accordance with what 'Umar b. al-Khaṭṭāb, and those who followed him, decided on the basis of the Qur'ān. If the man's decision to divorce his wife is the decision of someone with a fever, the effect is the same regardless of whether he has had intercourse with her. Proof of that is 'Uthmān b. 'Affān's opinion because of which he made the wife of 'Abd al-Rahmān b. 'Auf inherit from him after the end of her *'idda*. That is our interpretation of 'Uthmān's opinion: that if a woman's husband divorces her while ill, she inherits after the end of the *'idda*, regardless of whether her late husband had intercourse with her, as long as she has not remarried."

Ahmad was asked about a man who divorces his wife while terminally ill, before he has had intercourse with her.

He said, "There is disagreement on that question from the Successors."

He was asked, "What if he divorces her while terminally ill before he has had intercourse with her? Does she inherit from him?"

He said, "The Successors, al-Hasan, 'Aṭā', Jābir b. Zaid, Ibrāhīm, and al-Sha'bī, disagreed on this question; some of them said that she is entitled to a dower and that she inherits from him."

I said, "In accordance with whose doctrine do you have her inherit from him?"

He said, "This is not a question of a woman whose husband has not had intercourse with her, but it is a comparable problem (*mas'ala* *tashbihin*)."

§80 I said, "Does the *mukhtal'a* receive a divorce gift?"

Ahmad said, "She is like the divorcée."

I said, "Is her *'idda* the same?"

He said, "Yes."

Ishaq said, "I choose what Ahmad said, but those who say she waits an *'idda* of one menstrual period in accordance with what the Prophet ordered the wife of Thābit b. Qais to do also have a strong position (*madhhab qawī*)."

§81 I said, "When a man says to his wife, 'Your matter is in your hands,' for how long is her matter in her hands?"

Ahmad said, "For as long as he has not had intercourse with

her, in accordance with Ḥafṣa's saying to Zabrā': 'Your matter is in your hands as long as your husband has not had intercourse with you.'

Ishāq said, "I prefer what the majority of the scholars among the Successors have agreed upon, namely, that she has the option of choosing [whether to divorce] if her husband says 'Choose!' only during that particular conversation, while she is in a position to consider the choice that has been offered to her. The Prophet said to 'Ā'isha when he gave her a choice, 'Do not be in a hurry to make up your mind before consulting your parents.'"

Aḥmad said, "If the word *khiyār* is used in another context or with another meaning, then no legal consequences attach to it."

Ishāq said, "It is as he said."

§82 I said, "What if a man says to his wife, 'I make you a gift to your family?'"

Aḥmad said, "If they accept her, then that counts as a single divorce, and her husband can return to her; but if they reject her, it has no legal effect."

Ishāq said, "It is as he said."

§83 I said, "What about *khalīya*, *barīya*, *batta*, *bā'in*, and divorce including a statement of prohibition (*talāq al-ḥaraj*)?"

He [Aḥmad] said, "I am afraid that they all count as triple divorces, but I do not venture to give a *fatwā* on anything to do with them."

He was asked again, after that, and he said, "Mostly they become triple divorces, so they are, in fact, triple."

Ishāq said, "They are in accordance with the intention of the husband. He thinks about the matter, and it is in accordance with his intention—single, double, or triple."

Aḥmad said, "In the case of *khiyār*, if a woman chooses her husband, then that counts as a single divorce. In the case of *khalīya*, *barīya*, *batta*, *bā'in*, and divorce including a statement of prohibition (*talāq al-ḥaraj*), I am afraid they are all triple divorces. Further, in the case of divorce including [a statement on the part of the husband that his wife is] *ḥarām*, the husband must undertake the expiation for an oath of *zihār*."

Ishāq said, "It is as I previously explained it."

§84 I said, "The widow should not apply kohl, nor perfume, nor henna, nor spend the night away from home. Further, she should not wear dyed clothing."

Aḥmad said, "That is correct."

I said, "Does the divorcée behave in the same way as the widow with regard to ornaments?"

Aḥmad said, "Out of caution [the divorcée does]."

Ishāq said, "It is as he said in both cases."

§85 I said, "Does a woman's *'idda* start on the day her husband dies or, in the case of a divorcée, on the day she is repudiated?"

Aḥmad said, "Yes."

Ishāq said, "As he said, if that is known (i.e., the day of death or divorce), but if the exact day is not known, then it starts on the day the widow, or the divorcée, received the news [of her husband's death or of his repudiation of her]."

§86 I said, "What if a man marries a woman during her *'idda*?"

Aḥmad replied, "She is entitled to a dower, and [then] he seeks her hand with any other suitors after the end of her *'idda* from her first husband. Further, she must wait another *'idda* because of having been married in the middle of her first one."

Ishāq said, "As he said."

I said, "What if a man marries a woman during her *'idda* and then divorces her triply?"

Aḥmad said, "That is a disgusting problem!" Then he said, "His divorcing her has no legal effect." He spoke as if he did not consider this a [real] marriage.

Ishāq said, "His divorcing her has no legal effect on her."

§87 I said, "Does a woman inherit from her former husband after the end of her *'idda*?"

Aḥmad said, "Yes, as long as she has not remarried."

I said, "Even if her husband did not divorce her while he was terminally ill?"

He said, "No, only if he divorced her while terminally ill."

Ishāq said, "It is as he said."

§88 I said, "[What] if a man marries a woman and dies before he has had intercourse with her and without having divorced her?"

Aḥmad said, "I follow the *ḥadīth* of Ibn Mas'ūd about the marriage of Barwa' bt. Wāshiq."

Ishāq said, "It is as he said."⁴

§89 I said, "What about a woman acting as a witness in cases of foster-relationship and childbirth?"

Aḥmad said, "If a woman is in the process of nursing and she swears that she is, [that is acceptable because,] as Ibn 'Abbās said, [it can be ascertained] if she is lying about the white [liquid] of

her breasts. But [whatever] she swears to is not accepted in cases of childbirth."²¹

Ishāq said, "It is as he said."

§90 I said, "When does nursing (*al-raḍāʿ*) establish a foster-relationship?"

Aḥmad said, "One or two acts of nursing do not establish a foster-relationship."

I said, "How many do?"

He said, "If someone holds to the doctrine that five acts of nursing establish a foster-relationship, I do not take exception to his doctrine, which is the most reliable on this subject, even though I am somewhat fearful of following it."

Ishāq said, "Fewer than five acts of nursing do not create a foster-relationship, because of the soundness of what 'Ā'isha related concerning the matter. Possibly one act of suckling (*maṣṣa*) can be considered nursing whenever [feeding] actually occurs during a single act of suckling. If a woman nurses a child once and in that [particular] nursing session the child returns his mouth to the breast four times, I think an impediment to marriage is established, since he has completed five acts of nursing. Further, as long as the child keeps the breast in his mouth, even though he is satisfied, that counts as an act of nursing, because nursing and suckling are synonymous terms."

§91 Ishāq was asked about a woman whose milk has dried up, but who squeezes her breasts until a substance that resembles milk appears on the outside of them. Then, with this substance, she nurses a youth. "Is this considered an act of nursing, in accordance with the doctrine of those who hold that both a small and a large amount of nursing establish foster-relationship? Is it lawful for this youth after [taking in] this milk to marry this woman's daughter?"

Ishāq said, "Whatever comes out of a woman's breasts is milk. Even if she has weaned her child many days previously and then squeezes her breasts so that milk comes out with which she gives a child a drink, that nursing establishes a foster-relationship the same way it would if she gave a child a drink while she were still nursing [her own] child.

"In the doctrine of those who hold that a foster-relationship is

²¹ See AD 1 and note. See also Malik, *Mudawwana*, 5:158, for different opinions about whether two or four women are required to affirm the fact of childbirth. For general rules about women as witnesses, see *El*, s.v. "Shāhid."

established by both a small and a large amount of nursing, the milk in this particular instance *does* establish a foster-relationship; whereas [in the doctrine of] those who prefer [to think] that fewer than five acts of suckling do not establish a foster-relationship—for perhaps suckling means a single instance of nursing, and if that is the case she has given milk less than five times—the milk in this particular instance *does not* establish one.

"If an instance of nursing is measured, so that it consists of five acts of suckling on the part of a child—nursing, then stopping, then nursing—and if the child does this five or more times, since five acts of suckling have been measured, it is usually thought, out of caution, that such an instance of nursing does indeed establish a foster-relationship. [This is because] what we do not find explained in the Prophet's *ḥadīth* is that an instance of nursing, even though it consist of several acts of suckling, is [still] called an instance of nursing. That is why we exercise caution (e.g., say that five acts of suckling do establish a foster-relationship). As for two acts of suckling, there is no doubt that they do not establish a foster-relationship; neither do four; foster-relationship is not established until five acts of suckling have been completed, because of what 'Ā'isha explained, that the Qur'ān revealed ten known instances of nursing established a foster-relationship. She said, 'Then we went to five, and then the Prophet died while five is the number that was being recited from the Qur'ān.'²²

"There is disagreement because the explanation of suckling in relation to nursing was not clear. For many an act of suckling, if it takes a long time, is called an instance of nursing, and possibly an instance of nursing might include several acts of suckling, because sometimes a child nurses, then stops, then returns his mouth to the breast to suckle. And he may do that several times and have it be said that this is an instance of nursing in which several acts of suckling have taken place.

"Thus we have said that we have no doubt that fewer than five

²² Here, Ibn Rāḥwayh attempts to harmonize the traditions that say only one act of nursing establishes a foster-relationship with those that say five acts of nursing are required. An individual instance of nursing, he points out, might consist of five acts of suckling, so it too establishes a foster-relationship. Also see above, ch. 1, n. 87, especially the reference to Burton, *Collection*, pp. 87–89. In a tradition (which Burton quotes from Shāfiʿī), 'Ā'isha says the Qur'ān had previously included verses specifying that ten acts of nursing established a foster-relationship and then verses specifying that five acts of nursing established a foster-relationship.

acts of suckling do not establish a foster-relationship, even if each act of suckling takes a long time. Further, we prefer that the meaning of the *ḥadīth* be [that foster-relationship is established on the basis of] five instances of nursing, even though one instance of nursing might consist of several acts of suckling. But because of the various interpretations of the meanings [of the different words], we think that out of caution, one should take an act of suckling as not establishing a foster-relationship, the way instances of nursing do, as long as there are not five distinct acts of suckling in an instance of nursing.

"An act of sucking (*imlāja*) is less than an act of suckling (*maṣṣa*), except that it comes to mean the same thing when milk enters the stomach."

§92 I said, "What is *laban al-fahl*?"

Aḥmad said, "It is whatever comes from men and establishes a foster-relationship."

I said, "Such as what, for example?"

He said, "Suppose your brother's wife nurses a girl, then you become that girl's paternal uncle. Or, suppose your father's wife nurses a girl with milk that was produced because of your father's semen—this girl becomes your sister."

Ishāq said, "As he said, in accordance with the *ḥadīth* concerning Aflah, which is the basis [of our understanding of the meaning] of *laban al-fahl*."²³

I said to Ishāq, "Men nursed by 'Ā'isha's sisters used to be in her presence, but not men nursed by her brothers' wives. Is this contrary to the *ḥadīth* concerning Aflah?"

Ishāq said, "It is contrary to the obvious meaning of the *ḥadīth* concerning Aflah, but we understand it in accordance with its meaning considered in terms of what al-Qāsim related about the *ḥijāb*. Al-Qāsim [b. Muḥammad] did not describe any distinction [between consanguinity and marriage] in the forbidden degrees (*al-tahrim*) that contradicts the *ḥadīth* concerning Aflah, and this understanding is preferable."²⁴

²³ Aflah was a brother of the husband of 'Ā'isha's wet nurse. After the institution of the *ḥijāb*, 'Ā'isha would not let him into her presence, but the Prophet told her that Aflah was her uncle and hence allowed into her presence. For the many traditions about 'Ā'isha at first refusing to see Aflah after the institution of the *ḥijāb*, see Wensinck, *Concordance*, s.v. "Aflah Abū'l-Ja'd." For a summary discussion of the transmitters and content of these traditions, see Zurqānī's commentary on the *Muwatta'*, 3:239–240. See also Stern, p. 100.

²⁴ For the tradition that 'Ā'isha would not admit into her presence men nursed by

§93 I said, "Who is responsible [for seeing] to the suckling of a newborn infant?"

Aḥmad replied, "His agnates."

I said, "What if he has no agnates?"

He said, "Then a wet nurse is procured for him [and she is paid] from the treasury (*bait al-māl*). This the best [course in such circumstances and it is] in accordance with the *ḥadīth* about the castaway."²⁵

Ishāq said, "As he said."

§94 I said, "What about the maintenance of the pregnant divorcee?"

Aḥmad said, "It is her due."

Ishāq said, "As he said."

I said, "As long as she is in her 'idda?"

Aḥmad said, "Yes."

Ishāq said, "It is definitely as he said."

§95 I said, "What about [a man pronouncing a] divorce before marriage?"

Aḥmad said, "If he marries, I do not [in this case] order a man to separate [from his wife]."

Ishāq said, "Whenever a man has not designated a specific woman, no divorce occurs, regardless of whether he mentioned a time limit."

§96 Aḥmad said, "If a man fears temptation, I see no harm in his marrying a slave, even though he is already married to a free woman."²⁶

Ishāq said, "As he said."²⁶

her brothers' wives, see Mālik, *Muwatta'*, 3:242. Here too the first person in the *isnād* is al-Qāsim b. Muḥammad. Ibn Rāḥwayh's logic is hard to follow in this response; perhaps he wishes to point out that 'Ā'isha was wrong not to consider Aflah a foster-uncle. For another effort to explain 'Ā'isha's unwillingness to allow the foster-sons of her brother's wives into her presence, see Zurqānī's commentary on this tradition, in Mālik, *Muwatta'*, 3:242.

²⁵ A member of the Banū Sulaim is said to have found a castaway during 'Umar b. al-Khaṭṭāb's caliphate. 'Umar decreed the castaway a free man and his maintenance the responsibility of the Muslim community. See Mālik, *Muwatta'*, 4:18, and Shāfi'i, *Umm*, 7:232, for the same story. Shāfi'i's discussion of this story mentions two traditions about this event, the one in Mālik's *Muwatta'* and another (for which see also Bukhārī, *Ṣaḥīḥ*, 2:257) with a different *isnād* and different details. None of the problems associated with the wording and meaning of this tradition are of concern to Ibn Hanbal here; he merely mentions it to point out that the treasury is used to care for those who have no relatives to be responsible for them.

²⁶ But see above, IK 27.

§97 I asked Ishāq about a man who says, "If I marry a certain woman (*fulāna*), she is divorced," and then he marries [her].

He said, "As for [the times] when he designates a particular woman, I prefer [that he] refrain (*al-haff*) [from marrying her], although if he approaches her (i.e., to marry her), I do not rebuke him (*umjūhu*). However, otherwise, regardless of whether he sets a time, or names a tribe, the matter is clear: divorce does not occur."

§98 I said, "A husband and wife between whom *l'ān* proceedings have taken place never [again] have intercourse with each other?"

Ahmad said, "Correct. They never do."

Ishāq said, "Absolutely correct."

§99 Ahmad said, "When a female slave¹ commits adultery, since she is not *muḥsana*, she is flogged by her master. If a woman is *muḥsana* and commits adultery, then she is brought before the judge (*sultān*)."

Ishāq said, "It is as he said."

I said, "Does marriage with a Christian, Jewish, or slave woman make a free man *muḥsan*?"

Ahmad answered, "Marriage with a Jewish or Christian woman makes a free man *muḥsan*, but marriage with a slave woman does not."

I said, "Why not?"

He said, "Because if the slave woman commits adultery, she is not stoned."

Ishāq said, "It is as he said."

I said, "Mālik said that marriage with a slave woman makes a free man *muḥsan*."

Ahmad said, "It does not."

I said, "Mālik said that marriage with a slave man makes a free woman *muḥsana*."

Ahmad said, "It does not."

I said, "Mālik said that marriage with a free woman does not make a slave man *muḥsan*."

Ahmad said, "That is correct, because the slave man is not stoned if he commits adultery, and hence he is not *muḥsan*."

I said, "Mālik said that a slave woman is not made *muḥsana* because she is owned by a free man."

Ahmad said, "That is correct, because punishment is halved for her and she is not stoned if she commits adultery."

Ishāq said, "It is as he said."

§100 I said, "Can [a man take an oath of] *zihār* by [declaring his wife to be like the back of] any [female] relative whom it is unlawful [for him to marry]?"

Ahmad said, "Yes."

Ishāq said, "As he said."

§101 I said, "What if a man repudiates his wife by means of *zihār* and then has intercourse with her before expiating his oath?"

Ahmad said, "He performs one act of expiation."

Ishāq said, "It is as he said."

I said, "What if a man repudiates four wives at the same time by means of *zihār*?"

Ahmad said, "He still performs only one expiation."

Ishāq said, "It is as he said, if he repudiated them all at the same time."

I said, "Does the man who has repudiated his wife by means of *zihār* kiss or touch her before performing the expiation for *zihār*?"

Ahmad said, "I see no harm in that. Allāh said *before they touch one another* (58:4), as if He meant sexual intercourse."

Ishāq said, "It is as he said."

I said, "[What about] a man who says to his wife, 'You are my mother if I do such and such'?"

Ahmad said, "If he does [whatever it is], then he must perform the expiation for *zihār*."

Ishāq said, "I do not think that in this case he does perform the expiation for the oath of *zihār*, unless he intended his statement to result in *zihār*. If he intended divorce, however, then he is divorced."

§102 I said to Ahmad, "Does *ilā'* suspend a marriage? And when four months have passed is a woman divorced?"

Ahmad said, "The marriage is suspended by the judge (*sultān*) and the woman in question is her husband's wife, even if years go by, as long as the marriage has not been suspended. *Ilā'* occurs [only] because of the suspension of the marriage. God said, *Those who forswear their wives must wait four months; if they change their mind . . . And if they decide upon divorce . . .* (2:226–227) and that can be only after four months."

Ishāq said, "As he said."

§103 I said, "Can the man who has suspended his marriage, divorce?"

Aḥmad said, "When he does divorce his wife, the divorce is legally binding thenceforth."

Ishāq said, "As he said."

I said, "What about anger in relation to *ilāʾ*?"

Aḥmad said, "Anger and satisfaction are all the same if a man intends to take an oath."

I said, "It is not an oath, is it, if sworn for fewer than four months?"

Aḥmad said, "A man cannot be a *mūli* (i.e., one who has sworn an oath of *ilāʾ*) if he swears [not to have intercourse with his wife] for under four months?"

Ishāq said, "What we choose concerning this question is that whenever a man swears [not to have intercourse] for fewer than four months,* and then leaves his wife (i.e., does not have intercourse with her) for a total of four months, he becomes a *mūli*."

§104 I said, "What about the *mafqūd*?"

Aḥmad said, "A man is not a *mafqūd* unless he has gone on a military expedition; or he is at sea and cut off from his relatives; or he is a man who went out at night and was captured by *jinn*. All this is in accordance with 'Umar's doctrine about the *mafqūd*."

Ishāq said, "It is as he said, and holds true whenever someone is found in a certain place and then is missing from it."

I said to Aḥmad, "What if a missing person turns up and [finds that] his wife has remarried?"

Aḥmad said, "He is given the choice between the dower and his wife."

I said, "The dower he gave her?"^b

He said, "Yes."

Ishāq said, "It is as he said."

I said, "Who has the right to his wife, the impotent husband or the *mafqūd*?"

Ishāq said, "Each in accordance with the term specified for him, four years for the *mafqūd* and one year for the impotent husband."

Aḥmad said, "If a woman cannot find her husband, she waits four years, then four months and ten days; then she can remarry."

I said, "Even if she does not bring [her husband's absence to the attention of] the judge (*sulṭān*)?"

Aḥmad said, "Yes, although I prefer that she bring [it to the attention of] the judge. It says in the *ḥadīth* of 'Ubaid b. 'Umair,

a woman waits four years, then waits an *ʿidda* of four months and ten days, then calls on the *walī* of her missing husband to divorce her, then waits the *ʿidda* of a divorcee, and then remarries. This is the longest [period of time that has ever been] mentioned, and it is a weak *ḥadīth*."

Ishāq said, "The matter is in accordance with the *ḥadīth* of 'Ubaid b. 'Umair, whenever it has escaped [the attention of] the judge (*sulṭān*)."^c [But he said this] giving [the *ḥadīth*] a meaning usually not included in its transmission (*'alā ma'nā lā yarūna dhālika*).

§105 I said, "Does nursing forbid what birth does?"

Aḥmad said, "Yes. And the same holds true for [relationships established through] *laban al-fahl*."

Ishāq said, "It is as he said."

§106 I said, "What about a man who owns a female slave who is a Muslim and a male slave who is an unbeliever? Can he give them in marriage to each other?"

Aḥmad said, "No, the unbeliever is not the equal of the Muslim."

Ishāq said, "It is as he said."

§107 I said, "When does the waiting period for the impotent husband start?"

Aḥmad said, "On the day the matter is brought to the attention [of the judge]."

Ishāq said, "As he said."

§108 I said, "[What if] a man marries a woman without knowing that she has previously committed fornication?"

Aḥmad said, "She is his wife (i.e., their marriage is valid). If he separates from her (i.e., before having intercourse with her), she is entitled to half her dower."

Ishāq said, "It is as he said."

§109 I said, "What if a man has intercourse with one of his female slaves who does not menstruate, and then he wants to sell her?"

Aḥmad said, "He waits an *istibrāʾ* of three months on her behalf."

Ishāq said, "It is as he said."

§110 I said, "A man divorces his wife singly or doubly before having intercourse with her. Then another man marries her and also divorces her before having intercourse with her. Can she then return to the first husband?"

Aḥmad said, "Yes, she can return to him and be his wife in a

marriage that has one or two divorces behind it (*‘alā mā baqiya*).²⁷

Ishāq said, "As he said."

- §111 I said, "[What if] a man swears to divorce his wife without knowing [whether he means a] single or a triple divorce?"

Ahmad said, "It certainly counts as a single divorce, but his wife stays with him until he ascertains [whether he meant a single or triple divorce]."

Ishāq said, "As he said."

- §112 I said, "A woman is divorced, and then her husband dies during her *‘idda*. Does she inherit from him and wait a widow's *‘idda* starting on the day he died?"

Ahmad said, "Whenever the divorce is not final, mutual rights of inheritance prevail between the spouses if one of them dies. [In this case,] because she is in the position of inheriting from her late husband, the wife starts and completes a new *‘idda*, four months and ten days.

"However, if the wife was in the middle of an *‘idda* after a final divorce, then mutual rights of inheritance do not prevail between her and her husband, unless he divorced her during his terminal illness. In that case, she inherits from him both during and after her *‘idda*, as long as she has not remarried, in accordance with the way ‘Uthmān made Tumādir inherit from ‘Abd al-Rahmān b. ‘Auf."

Ishāq said, "It is the way he said."

- §113 I said, "A man has a female slave with whom he has intercourse. Then he wants to give her in marriage to another man. Should he wait an *istibrā’* on her behalf?"

Ahmad said, "Yes. If he sells her, he should also wait an *istibrā’* on her behalf."

Ishāq said, "As he said."

Ahmad said, "But whenever he has not been having intercourse with her, he can sell her before waiting an *istibrā’*. The *sunna* concerning *istibrā’* applies to the buyer. It concerns the seller only as a precaution for himself if he has been having intercourse with her. That *hadīth* of Ibn ‘Umar—that there need be no *istibrā’* if the slave being sold is a virgin—is weak. ‘Abd al-Wahhāb related it on the authority of ‘Ayyūb on the authority of Muḥammad. The well-known *hadīth* on the authority of Nāfi’

on the authority of Ibn ‘Umar is that for a female slave one waits an *istibrā’* of one menstrual period."

Ishāq said, "As he said, except for [what he said about] Ibn ‘Umar's statement concerning the virgin. It is a sound *hadīth*. This (i.e., Ahmad's response) does not contradict what Ibn ‘Umar said. Whenever a man buys a female slave, he waits an *istibrā’* of one menstrual period, because [in this instance] this [female slave] is not a virgin."

- §114 I said, "Can a man swear an oath of *zihār* with regard to one of his female slaves?"

Ahmad said, "When she is his wife, yes he can, but not when she is his property."

Ishāq said, "This is the way it is; as he said."

- §115 I said, "How does a man institute *li‘ān* proceedings against his wife?"

Ahmad said, "In accordance with what is in the Book of God."

I said, "Is he stopped before the fifth time and is it said to him, 'Fear God?'"

He said, "Yes, the fifth is the statement that effects the legal consequences of *li‘ān*." He said, "The husband says four times that God is his witness that he is telling the truth in accusing his wife of adultery. Then he is stopped before [he says it] the fifth time and told to fear God [if he is lying], for the fifth is the statement that brings about the legal consequences of *li‘ān*. Then, if he swears the fifth time, he swears *invoking the curse of Allāh on him if he is of those who lie* (24:7).

"It is the same for the wife. She is stopped before she swears a fifth time [that she is innocent of the accusation against her] and told to fear God, for the fifth will cause her to be punished [if she is lying]. Then if she swears [a fifth time], she says, *that the wrath of Allāh be upon her if he speaketh the truth* (24:9)."

I said, "What if he says he is lying the fifth time?"

He said, "He is beaten and she remains his wife."

I said, "What if she does not swear [that she is innocent] the fifth time?"

He said, "She is not stoned and they say to her, 'Go,' and the child belongs [only] to her.

"However, if she confesses four times that she is guilty, she is to be stoned. The Madinese say that if she refuses to participate in the *li‘ān* proceedings, she is to be stoned, and that is because they say he is to be stoned if he confesses, and she is to be stoned if she confesses."

²⁷ Divorce before intercourse is definite, in the sense that if a man wishes thereafter to marry the same woman, he must do so on the basis of a new marriage contract.

Ishāq said, "It is as he said, except that if she refuses to participate in the *li'ān* proceedings, she is to be stoned because of His saying, *And it shall avert the punishment from her* (24:8)." .

I said to Ishāq, "What are the legal consequences for the spouse who refuses to participate in *li'ān* proceedings?"

He said, "The rule in such an instance is that the wife in question is given the opportunity to participate. If she refuses, she is reminded of Hellfire and warned of it. Finally, if she will neither confess, nor swear that she is not guilty, she is to be stoned, because God said, *And it shall avert the punishment from her if she bear witness before Allah four times, to the end of the āya* (24:8). The scholars have interpreted *punishment* as meaning *ḥadd* punishment (i.e., rather than the punishment of Hell). But whenever she does not avert the punishment from herself, through [participating in] the *li'ān* proceedings, the *ḥadd* punishment is in force for her. Al-Mu'tamir informed us of this on the authority of Abū 'Awāna on the authority of Hammād: she is to be stoned.

"This is the doctrine according to what all of them say, except that they exceeded the bounds of their statement (*qiyād ḥalā-mihim*) when they agreed that the accused, . . . they hold against him the claim of the accuser and are thus forced, if a wife refuses to participate in *li'ān* proceedings, to construe her refusal as a confession of adultery.

"And the husband, if he refuses to institute *li'ān* proceedings after slandering his wife, and [at the same time] remains firm in his insistence on slandering her, receives a *ḥadd* punishment and she remains his wife. Further, if he admits he was lying, he also receives a *ḥadd* punishment and she remains his wife."

§116 I said, "[What if] a female slave is divorced and then manumitted during her *'idda*?"

Ahmad said, "If she has been doubly divorced and then manumitted, and her husband subsequently marries her, she is his wife in a marriage that has a single divorce behind it. This is in accordance with the *ḥadīth* of Yahyā b. Abi Kathīr on the authority of 'Amr b. Sa'īd on the authority of Abū'l-Ḥusain on the authority of Ibn 'Abbās on the authority of the Prophet."

Ahmad said, "This is the case when her husband is a slave; however, when her husband is free, a free man divorces a slave wife triply."

Ishāq said, "As he said."

§117 I said, "[What if] a slave divorces his wife twice?"

Ahmad said, "As long as both are slaves, they cannot remarry.

But if both are manumitted, then if the man wishes, he may remarry the woman, and she is his wife in a marriage that has a single divorce behind it. [This is] Ibn 'Abbās's doctrine."

I said, "[What if] they are manumitted during her *'idda*?"

He said, "During or after her *'idda* it is the same."

Ishāq said, "As he said."

I said, "If a slave divorces his wife [finally] while she is [also] a slave, and then she is manumitted, can he [re]marry her, while he himself remains a slave?"

Ahmad said, "No. Divorce is for men."

Ishāq said, "As he said."

I said, "Is a [manumitted] female slave given the option [of separating] from her husband if he is free?"

Ahmad said, "No. Whenever her husband is free, she has no option; however, she does have the option of separating from a slave husband. If she chooses herself, they are separated without a divorce."

Ishāq said, "As he said."

Ahmad said, "If the freed female slave chooses herself, that counts as a single divorce without [the possibility of her husband's] return [to her]."

Ishāq said, "It is as he said, because she chooses herself rather than a slave. If the male slave is manumitted, then he can [re]marry her in a marriage that has one divorce behind it."

I said to Ahmad, "Can this manumitted male slave seek her hand during her *'idda*?"

He said, "Yes."

Ishāq said, "As he said."

I said, "Why is this separation not a divorce?"

Ahmad said, "Divorce is something a man says, but here the separation is initiated by the woman."

Ishāq said, "As he said."

§118 I said, "[What] if a female slave chooses herself after being given the option to do so, and she does so before her slave husband has had intercourse with her?"

Ahmad said, "Then she receives no dower. If she chooses the slave, then her master receives the dower."

Ishāq said, "As he said, because she receives herself."

I said, "If her husband makes her a *mukātaba* slave, is she given the option of separating from him?"

Ahmad said, "What is her husband?"

I said, "A slave."

He said, "Then regardless of whether he or someone else frees her, she is still given the option of staying with him or choosing herself."

Ishāq said, "As he said."

- §119 I said, "If the master of an *umm al-walad* gives her in marriage to another man and then dies before her new husband has had intercourse with her, is she given the option of separating from him?"

Aḥmad said, "She is free. She is given such an option. If she chooses herself, neither she nor her master receives a dower. If she chooses her husband, then her master receives the dower."

I said, "What if her husband has had intercourse with her, and then her master dies?"

He said, "She becomes free and is given the option [of separating from her husband], and her master receives the dower. But when she is married to a free man, she has no option."

I said, "Does her master still receive her dower?"

He said, "Yes, because she is a slave. But if she is a *mukātaba* slave, then the dower does not go to her master; rather it goes to her, unless she proves unable [to purchase her freedom] and so is returned to slavery. Then her master receives the dower."

Ishāq said, "As he said."

- §120 I said, "[What if] a man is married to a slave and then buys her?"
Aḥmad said, "The marriage is annulled, and he continues [to have] sexual relations with [her because she is now] his property."

Ishāq said, "As he said."

- §121 I said, "Is the couple married in a *shighār* marriage separated?"

Aḥmad said, "Yes, they are separated."

Ishāq said, "Definitely [they are separated], as he said."

- §122 I said, "The *ḥadīth* of Zaid b. Arqam [says] that three [men] had intercourse with a woman during the same interval of purity [between two of her menstrual periods]."

Aḥmad said, "[In this case,] I find the *ḥadīth* of 'Umar on physiognomy most suitable."

Ishāq said, "The *sunna* in this case is what Zaid b. Arqam related, because it is sound doctrine on the authority of the Prophet."²⁸

²⁸Zaid b. Arqam reported that the three men in question brought their dispute over which of them was the father of the woman's child to 'Alī. 'Alī settled the matter by

- §123 I said, "Does a man who takes an oath of *zihār* expiate his oath even if he keeps it (i.e., never has intercourse with his former wife again)?"

Aḥmad said, "He need not expiate his oath of *zihār* if he keeps it."

Ishāq said, "As he said."

- §124 I said, "When does a young girl need her closest male relative (*mahram*) [to act as a guardian]?"

Aḥmad said, "Whenever she becomes physically desirable. A girl of nine years of age may be a woman."

Ishāq said, "As he said."

- §125 I said, "A Jewish or Christian woman is married to a Jew or Christian. What if one of these women converts to Islam before her husband has had intercourse with her?"

Aḥmad said, "She receives no dower."

I said, "Does she have the right to choose herself regardless of her husband's wishes?"

He said, "Yes."

Ishāq said, "As he said."

- §126 I said, "If a man divorces his wife while she is [still] a virgin before having intercourse with her, can her father exempt the husband from half of the dower?"

Aḥmad said, "It is my opinion that only her father's exemption is valid, and he can take what he wishes of her property, or indeed all of it."

Ishāq said, "The father's exemption is not really an exemption because the marriage contract is in the husband's hands."

- §127 I said, "Can a woman insert as a condition into her marriage contract that her husband not marry a second wife, or that he not take a concubine, or that he not expel her from her house?"

Aḥmad said, "These conditions, [if she stipulates them,] are all lawful for her, and if he marries [another wife] or takes a concubine, she is given the option of choosing to remain married to her husband if she wishes, or of separating from him if

having them draw lots. For several versions of this story with varying details, see Abū Dāwūd, *Sunan*, 2:235–236. For a fantastic story of 'Umar calling for a physiognomist to settle a paternity dispute between two men, see Mālik, *Muwatta'*, 4:24–25. The physiognomist in this instance did not clearly choose one of the men, and 'Umar had the youth, when he was old enough, choose which of them he wished to belong to. In any case, Ibn Hanbal and Ibn Rāḥwayh disagree here; one favors drawing lots, the other prefers physiognomy.

she wishes. The Prophet said, 'The best of conditions is the one that fulfills the prerequisites for women being lawful to you.'

Ishāq said, "As he said."

- §128 I said, "[If] a man marries a female slave and she gives birth and then he buys her, is she an *umm al-walad*?"

Ahmad said, "No, not unless he owned her when she became pregnant."

Ishāq said, "As he said."

- §129 I said, "Can a man who is in a state of *ihrām* return to his wife [if he has previously divorced her]?"

He said, "No. This man, as far as I am concerned, [must return to his wife on the basis of] a new marriage."

Ishāq said, "He can return [to his wife]. But if she has been definitely divorced (*bānat biwāḥida*), he cannot [just] marry her (i.e., if her *'idda* ends before he returns to her, so he must remarry her to return to her), because [for a new marriage] she must give her consent."²⁹

- §130 I said, "To how many women can a slave be married at the same time?"

Ahmad said, "The slave can be married to two women at the same time."

Ishāq said, "As he said."

- §131 I said, "If a slave's wife owns him, or a husband owns his slave wife, can the marriage be ended by a separation without a divorce?"

Ahmad said, "Yes."

Ishāq said, "As he said."

I said, "What if a wife manumits her husband during her *'idda*?"

He said, "The two can return to each other only by means of a new contract and [the offices of] a *wali*."

Ishāq said, "As he said."

- §132 I said, "What if a man puts his wife's matter into her hands?"
Ahmad said, "Whatever she decides on [by way of divorce] is legally valid (*al-qadā' mā qadat*)."

²⁹ Ibn Hanbal's assumption is that the woman's *'idda* will end if her husband does not return to her before his period of *ihrām* is over. Ibn Hanbal prefers a new marriage to violating the state of *ihrām*. See Ibn Abi Ya'la, *Tahagūt*, 1:206. Ibn Rāḥwayh disagrees and says a man can return to his wife when he is in a state of *ihrām*, and then he addresses another possible aspect of the problem, that of a definite and hence final divorce. See below, 1K 165, for Ibn Rāḥwayh's opinion of what is involved in a man's returning to his wife.

I said, "What if he rejects her decision and says that he meant only a single divorce? Is he made to take an oath to that effect, and does he have the right to return to her (i.e., if she divorced herself triply, and he meant to delegate only one or two divorces)?"

Ahmad said, "In accordance with the doctrine of Ibn 'Umar and 'Uthmān the decision is hers, and if the husband rejects it, that is not accepted from him."

Ishāq said, "It is in accordance with what Ibn 'Umar said, except the husband can take an oath about his [original] intention."

I said, "For how long is a wife's matter in her hands?"

Ahmad said, "If a husband has put his wife's matter into her hands, it remains in her hands until he has intercourse with her or until he takes it back."

I said, "Can he take it back if he wishes?"

He said, "Yes, the husband can take it back if he wishes."

Ishāq said, "As he said. The husband can take it back, but he (i.e., Ibn 'Umar) did not say that her matter remained in her hands until her husband had intercourse with her, so that is not clear (*bayyin*)."

- §133 I said, "[What if] a man repudiates his wife by means of an oath of *ḡhār*, on several occasions?"

Ahmad said, "It is incumbent upon such a man to expiate his oath only once, as long as he has not done so."

Ishāq said, "As he said."

- §134 I said, "[What about] a man who says to his wife, 'Every woman I marry in addition to you, for as long as I live, is to me as the back of my mother?'"

Ahmad said, "For all of that, it is sufficient for him that he free one slave."

Ishāq said, "As he said."

Ahmad continued, "If [such] a man marries two women in a single contract, then he must perform a single act of expiation. But if he marries one woman [after such a statement], he must expiate his oath of *ḡhār*; then if he marries another, he must expiate his oath of *ḡhār*. That is, he must perform an act of expiation for every woman he marries."

Ishāq said, "As he said."

- §135 I said, "Can women swear an oath of *ḡhār*?"
Ahmad said, "Those who hold that it is an oath [thereby] make incumbent upon her its expiation."

Ishāq said, "A woman cannot swear an oath of *ḡhār*, because

of Allāh's description of it as pertaining to husbands. However, it is an oath which should be expiated, because the intention in that (i.e., an oath of *ẓihār*) is [that of] an oath."

§136 I said, "Sufyān said, 'If a man swears an oath of *ẓihār* with regard to a female slave of his, it counts as [an oath of] *ẓihār*.'"

Aḥmad said, "No, it can only be an oath of *ẓihār* with regard to a man's wife."

Ishāq said, "As he said."

§137 I said to Aḥmad, "Does an oath of *ẓihār* have legal consequences if taken with regard to women within the forbidden degrees by blood- as well as foster-relationships?"

He said, "I do not know about foster-relationships, and I am afraid to say anything about them."

Ishāq said, "Foster- and blood-relationships are the same."

§138 I said to Aḥmad, "If a man takes an oath of *ẓihār* against his wife and then separates from her, should he perform an act of expiation for *ẓihār*?"

Aḥmad said, "No. The expiation for *ẓihār* is performed by a man who wants to return to his wife."

Ishāq said, "As he said."

§139 I said, "Can a man take an oath of *ilā'* in addition to repudiating his wife by means of *ẓihār*? [If so,] how would that work?"

Aḥmad said, "*Ilā'* according to our doctrine suspends a marriage, as if a man has taken an oath and said, 'By God, I will not have intercourse with you [his wife] for a year,' and thus becomes a *mūlī* when four months have passed. Then if his wife asks that the marriage be suspended, after four months have passed, he either has intercourse with her or he divorces her. If, after that (i.e., taking an oath of *ilā'*), he says to her that she is to him like the back of his mother if he has intercourse with her during the coming year, and he then intends to have intercourse with her after four months have passed, he is told [he must either] have intercourse with his wife [or divorce her]. Then, if he does [wish to] have intercourse with his wife, he has obligated himself first to do the expiation for *ẓihār*. If he refuses to have intercourse with his wife and she wants to be separated from him, the judge (*hākim*) divorces her from him."

Ishāq said, "As he said, whenever the husband refuses to have intercourse [with his wife]."

§140 I said, "How long is the *ʿidda* of the *mukhtalīʿa*?"

Aḥmad said, "It is three menstrual periods, the same as the *ʿidda* of the divorcee."

Ishāq said, "As he said. Whoever follows the doctrine that it is a single menstrual period, in accordance with the Prophet's order to the wife of Thābit b. Qais b. Shammāsh; well, that is [also] a doctrine. 'Uthmān b. 'Affān, Ibn 'Umar, and Ibn 'Abbās held it (*qālahu*), and I follow it."

§141 I said, "Does divorce have any legal effect on a woman as long as she is in her *ʿidda*?"

Aḥmad said, "No it does not, as long as she is in her *ʿidda* because the couple do not inherit from each other. Further, if the husband slanders his wife (*qadhafahā*) during her *ʿidda*, *liʿān* is not instituted between him and his wife."

Ishāq said, "As he said."

§142 I said, "If a man divorces his wife triply, then denies responsibility for her pregnancy, he institutes *liʿān* proceedings against her."

Aḥmad said, "A man institutes *liʿān* proceedings against his wife in order to deny paternity. If he slanders his wife and there is no question of a child, then he does not institute *liʿān* proceedings against her, but if she is pregnant, he does."

I said, "What if a man divorces his wife triply, then slanders her while she is pregnant?"

He said, "This is serious. If she is pregnant, then *liʿān* must be instituted between them."

Ishāq said, "As he said, and the meaning of his (i.e., Aḥmad's) saying that when he divorces her triply and she is not pregnant, a man does not institute *liʿān* proceedings against his wife, is that she is not, at that time, his wife. When she is pregnant, *liʿān* addresses the problem of the child's paternity."

§143 I said, "Can a slave institute *liʿān* proceedings against his wife if he is married to a free [Muslim] woman, a slave, or a free Jewish or Christian woman?"

Aḥmad said, "Both husbands (i.e., the slave and the free man) can institute *liʿān* proceedings. Indeed it (i.e., *liʿān*) is for the purpose of denying the paternity of the child. Therefore, if a man has slandered [his wife], she must be pregnant, or he would not have started *liʿān* proceedings."

Ishāq said, "As he said."

§144 I said, "If a man divorces his wife triply and she is both a slave and pregnant, is it incumbent upon him to provide maintenance for her?"

Aḥmad said, "She is pregnant with his child, so it is incumbent upon him."

Ishāq said, "As he said."

I said, "What about the maintenance of a pregnant divorcee?"

Aḥmad said, "If she is pregnant, maintenance must be provided for her; but if she is not, she receives neither maintenance nor lodging, in accordance with the *ḥadīth* of Fāṭima [bt. Qais]."

Ishāq said, "As he said."

§145 I said, "If a slave divorces his slave wife and then she is manumitted, how long is her *ʿidda*?"

Aḥmad said, "If he has divorced her singly and then she is manumitted during her *ʿidda*, she completes the *ʿidda* of a free woman. But if he has divorced her doubly, she waits the *ʿidda* of a slave woman, regardless of whether she is manumitted during or after her *ʿidda*."

Ishāq said, "As he said."

§146 I said to Aḥmad, "What about the *ʿidda* of the woman who menstruates?"

He said, "If she knows her menstrual cycle, then she waits an *ʿidda* in terms of it. But if her cycle is irregular, then her *ʿidda* is one year."

Ishāq said, "As he said."

I said, "Mālik said, 'Our practice (*al-amru ʿindanā*) in the case of the divorcee whose menstrual cycle has been interrupted is that if she is not certain why [this has happened], she wait nine months, and if she does not menstruate during those nine months, she wait three more. Then if she menstruates before the three months are over, she waits an *ʿidda* in terms of menstrual periods. If nine months pass without her menstruating, she waits an *ʿidda* of three months, and if she menstruates at the end of the third, she has completed an *ʿidda* in terms of menstruation. If she does not menstruate at all, she can remarry after [nine months plus] an [additional] *ʿidda* of three months. During this three-month period, her husband can return to her if he has not made her divorce a final one (*batta*).'"

Aḥmad said, "All of this is as he said, when she does not know what caused her to stop menstruating. But when she does know and it is because of illness or nursing, [then the matter is decided] in accordance with the doctrine of ʿAbd Allāh b. Maṣūd and ʿUthmān. In accordance with the doctrine of Ibn Maṣūd, ʿAlqama inherited from his wife. Her menstrual periods had stopped for sixteen months, and that was because she had become ill, so her menstrual periods had stopped because of (*li-illati*) illness. When a woman is nursing and her menstrual periods stop, then the matter is in accordance with what ʿUthmān said and with the *ḥadīth* of Muḥammad b. Yabā b. Ḥabbān."

Ishāq said, "It is as he said . . .³ and whatever was an exception in instances of illness and nursing. The meaning of the doctrine about ʿAlqama and his wife's illness is that Ibn Maṣūd favored the opinion that pregnancy could last two years, as ʿĀ'isha said. What we base our doctrine on is what Mālik said—nine months, and then after that three months. That makes a year, except in the cases of nursing and pregnancy. Then, a woman waits two whole years in accordance with what ʿĀ'isha said: 'A child does not remain in the womb more than two years.'"

Ishāq said, "Consider the case of a man who divorces his wife, who then menstruates twice but not again for over a year. Then she is given in marriage to another man by her *wali*. She stays with this husband several months, then he divorces her singly by means of *khulʿ*. Eight months after this *khulʿ* divorce, the first husband seeks her hand, marries her, and has intercourse with her. Then she menstruates once, then becomes pregnant and delivers.

"The *sunna* concerning that is that when the divorcee is a woman who menstruates and then stops, she waits two years, because it has been established that most women are not pregnant for more than two years and usually it is nine months. But ʿUmar b. al-Khaṭṭāb thought that the longest an *ʿidda* should last is a year—nine months for pregnancy and then three months after that for the *ʿidda* of the woman who has become too old to menstruate. Then she may be remarried. This is what ʿUmar said, and the Madinese followed it from ʿUmar's day until now. Mālik adopted it and so did scholars before him, and I think it is valid (*jāʾiz*). As for a young woman who has not menstruated for two years, there is no doubt, as far as we are concerned, that after two years she should not wait an *ʿidda*, and that she has the right to be married to whomever she wishes. And those who considered it necessary to reckon her *ʿidda* in terms of months were in error (*akhṭaʾa*).

"Thus, when a year had elapsed for this [woman] (i.e., the one in the initial hypothetical case Ishāq has set forth) and she married another husband who then divorced her by means of *khulʿ*, that was valid in accordance with what we have described of ʿUmar's doctrine and the doctrine of the Madinese. Then if the first husband remarries her after the second has had intercourse with her, that [too] is a valid marriage. If the wife menstruates once while [re]-married to her first husband and then becomes pregnant, the child is his."

§147 I said, "When a man divorces his wife in a nonfinal divorce

and she waits a portion of her *ʿidda*, then her husband returns to her, but separates from her [again] before having intercourse with her, can she simply complete her *ʿidda*?"

Aḥmad said, "This is what I hold (*aqūlu*): she must start [it] again."

Ishāq said, "As he said."

§148 I said, "When are a husband and wife separated from each other? [Are they separated] when the husband cannot support his wife?"

Aḥmad said, "When he turns out to be incapable of supporting her."

I said, "Is he given any time limit?"

Aḥmad said, "No."

Ishāq said, "As he said."

§149 I said, "What about the *ʿidda* of the *umm al-walad* who does not menstruate and whose master dies?"

Aḥmad said, "As far as I am concerned, I prefer that she wait three months—the shortest time in which pregnancy becomes evident."

Ishāq said, "Four months and ten days."

§150 I said, "When the slave divorces his slave wife finally and then dies during her *ʿidda*, does she wait the *ʿidda* of a widow, an *ʿidda* of two months and five days?"

Aḥmad said, "Yes."

Ishāq said, "That is the way it should be."

I said, "What if she has been manumitted, he has the right to return to her, she has not opted to separate from him, and then he dies during her *ʿidda*? Does she wait the *ʿidda* of a free woman?"

Aḥmad said, "Yes."

I said, "Does she inherit from him?"

Aḥmad said, "Yes, if she is free and waiting an *ʿidda* resulting from his divorce."

Ishāq said, "As he said."

§151 I said, "What is the value of a gold *nawāt*?"

Aḥmad said, "Three and one-third dirhams."

Ishāq said, "The *nawāt* is five dirhams."³⁰

§152 I said, "What constitutes a secret marriage?"

Aḥmad said, "One that is not made public, even though the couple were married to each other with *walīs*."

Ishāq said, "It is like that."

§153 I said, "What about a man to whom a woman is married for one thousand dinars, or for two thousand, if he already has a wife."

Aḥmad said, "The marriage takes place in accordance with whatever conditions were agreed upon."

Ishāq said, "As he said."

§154 I said, "What if a man marries a woman secretly for a [certain] dower and they make public another one?"

Aḥmad said, "They must pay what they said [publicly], and it (i.e., the marriage) is valid on the basis of the public [dower]."

Ishāq said, "The dower is the secret one, [even] when they say [that] after this (i.e., the secret dower), what [remains] of the public [dower] is [also] hers."³¹

§155 I said, "What if a woman's husband dies and she claims her dower?"

Aḥmad said, "It must be obtained from [his] relatives. If [that] is not [possible], then she has the right to a fair dower."

Ishāq said, "As he said, and the same holds true when both spouses die and their relatives dispute [the amount of her dower]."

§156 I said, "What if a man marries a woman for a dower the amount of which is known, and then he has intercourse with her and says he paid it, but she says he did not?"

Aḥmad said, "His relatives must be applied to."

Ishāq said, "It is like that."

§157 I said, "[What if] it is said [to a woman], 'We will give you in marriage if you fetch a dower of such-and-such'?"

Aḥmad said, "This is a promise after which a marriage does not take place."

Ishāq said, "As he said."

§158 I said, "What if a Christian man marries a Christian woman for a dower of wine and then the two of them become Muslims?"

Aḥmad said, "If the man has had intercourse with his wife, then the marriage is valid. If not, then she receives a fair dower for a Muslim woman of her rank."

Ishāq said, "It is as he said, if they have not disputed [the dower] in front of a Muslim judge. For our judges can give judg-

³⁰ Ibn Rāhwayh seems to try to make sure that the woman receives the difference between the secret and the public dower if the public dower is larger. See Mālik, *Mudawwana*, 2:219, where Mālik agrees with Ibn Rāhwayh that the secret dower is the valid one, as long as it has been properly witnessed. See also Ibn Qudāma, *Mughni*, 8:81–82, for a discussion of this question. Ibn Qudāma quotes al-Kausaj's text.

³¹ This response seems misplaced in the ms.

ments only in accordance with the precepts of Islam (*yaqḍū bi-ḥukmi ahli'l-islām*)."

§159 I said, "If a man marries a woman and does not have intercourse with her, then marries another and does have intercourse with her, what happens if it turns out that the wife with whom he has had intercourse is the mother [of the wife with whom he has not had intercourse]? Are both of them forbidden to him?"

Aḥmad said, "Both of them are forbidden to him."

Ishāq said, "As he said."

I said, "If a man marries a woman and does not have intercourse with her, then marries another and does have intercourse with her, what happens if it turns out that the wife with whom he has had intercourse is the daughter [of the wife with whom he has not had intercourse]?"

Aḥmad said, "He separates from both of them, then he may seek the hand of the daughter [again], if he wishes."

Ishāq said, "As he said."

I said, about a man who marries a woman and has intercourse with her, then marries another and has intercourse with her: "If the two wives are mother and daughter, are both forbidden to him?"

Aḥmad said, "[Yes, and] he separates from both of them."

Ishāq said, "As he said."

I said, "If a man marries a woman and does not have intercourse with her, then marries another and does have intercourse with her, what happens if the wife with whom he has had intercourse is the sister of the one with whom he has not?"

Aḥmad said, "He separates from the one with whom he has had intercourse and abstains from having intercourse [with the other] until the *ʿidda* of the one from whom he has separated is complete. Then, the first one [with whom he has not had intercourse] is his wife."

Ishāq said, "As he said."

I said, "What if he had intercourse with the first one and then marries the second and [also] had intercourse with her? Are both forbidden him?"

Aḥmad said, "He is separated from the second and abstains from having intercourse with the first, until the *ʿidda* of the second is over. Then the first is his wife."

Ishāq said, "It is this way."

§160 I said, "A man marries a woman and has intercourse with her, then marries a minor girl who is [still] nursing. If the [first]

woman the man married nurses the girl, are both of them forbidden to him?"

Aḥmad said, "He separates from the young girl because she has been nursed by a wife of his, and she receives half her dower charged to the woman who nursed her, because she has separated from her husband (i.e., before intercourse). He separates from the wife who nursed the young girl because the woman has become her mother through nursing."

Ishāq said, "As he said, as long as there have been five acts of nursing (*khamsatu raḍaʿāt*)."

I said, "Sufyān said the following about a man who marries a young girl who is nursing and then marries a second who is nursing: 'If the mother of the first comes along and nurses the second, both girls are forbidden to him, because they have become sisters. Then the husband pays to each of them half her dower and marries whichever of them he wishes.'⁹ Further, the mother of the first, the one who nursed the second, recompenses the husband."

Aḥmad said, "He pays the dower of each of them; each receives half her dower."

Ishāq said, "As Aḥmad said."

I said, "Sufyān said the following about a man who is married to a certain woman and then marries in addition a young girl who is nursing: 'If the woman goes and nurses the young girl, the man's marriage with both of them is invalid, the husband pays half her dower to the young girl, and his wife who nursed her pays him. If he has had intercourse with the woman who nursed the girl, then the woman receives her dower. If he has not, she receives nothing. Further, she must pay the husband whether she nursed her young co-wife out of ignorance or forgetfulness.'"

Aḥmad said, "This is sound, and if he has not had intercourse with the nursing woman, there is no harm in his marrying the young girl."

Ishāq said, "It is as he said."

§161 I said, "Sufyān said the following about a man who has intercourse with a female slave belonging to his son: 'If she becomes pregnant, then she becomes an *umm al-walad*. If not, the son may sell her if he wishes.'"

⁹It is assumed here that the man divorces both girls before he has had intercourse with them and therefore owes each half her dower as a divorce gift.

Aḥmad said, "If the son owns the slave but has not had intercourse with her, then if the father makes her pregnant, the child is his and the slave becomes his and the son has no part of her."

Ishāq said, "As he said."

- §162 I said, "Sufyān said the following concerning a man who divorces his wife singly and then after her *'idda* is over claims that he has returned to her by means of an oath [to the effect] that he has returned to her, and that if he has not, she has the right to herself: 'The testimony of his oath [in this case] is not valid unless it is witnessed by two men.'"

Aḥmad said, "This is sound. For legal claims (*al-ḥuqūq*), the testimony of a man with his oath is permitted, but in cases involving divorce or *ḥadd* punishment, it is not."

Ishāq said, "As he said."

- §163 Aḥmad said, "If a man orders his son to divorce his wife, the son should obey his father if the father is a pious man." Aḥmad adduced as proof the *ḥadīth* of Ibn 'Umar when 'Umar ordered him to divorce his wife.

I said, "Should a son also obey his mother?"

Aḥmad said, "He should not obey her in this (i.e., divorcing his wife)."

Ishāq said, "If a man obeys his father and his mother, that is meritorious, but he is not obliged to divorce his wife as a duty, because divorcing a pious woman is not an aspect of reverence for one's parents."

- §164 I said, "If a man marries a woman within the forbidden degrees and has intercourse with her, she receives a dower."

He said, "If he marries his foster-mother, he must give her a dower."

I said, "Or his mother?"

He said, "I meant to say that. Further, when he marries his mother or someone within the forbidden degrees intentionally, he is killed."

Ishāq said, "It is as he said in accordance with what the Prophet said: 'Whoever approaches someone within the forbidden degrees should be killed.'"³³

- §165 I said to Aḥmad, "What about a man who divorces his wife and then returns to her with witnesses, but his return is not witnessed until her *'idda* has ended?"

He said, "If he has returned to her, then it is indeed a return."

Ishāq said, "If he has returned to her with witnesses, it counts as a return, and if he has had intercourse with her, signifying by this act a return, then it is a return; but if he has not had intercourse with her, then he has not returned to her, unless there have been witnesses."

- §166 I said, "What if a man coerces a woman against her will? What happens to him?"

Aḥmad said, "He receives a *ḥadd* punishment. She does not. She receives nothing, if she is a *ṭhayyib*; if she is a *bikr*, then she receives a fair dower."

Ishāq said, "As he said."

- §167 I said,¹ "[What if] a female slave comes to some people and says she is free, so then a man marries her and she gives birth to a child?"

Aḥmad said, "The slave is returned to him (i.e., her master), and he (i.e., the husband) ransoms his child slave for slave. Further, the female slave receives whatever dower was stipulated for her."

Ishāq said, "As he said."

- §168 I said, "A husband finds another man with his wife. Can the husband kill him?"

Aḥmad said, "If the husband brings witnesses that he found this man with his wife in his house, then the man's blood can be shed with impunity (*yahduru damahu*), even if the husband had [only] two witnesses."

Ishāq said, "As he said."³⁴

- §169 I said, "If a man commits adultery with a woman, then neither his son nor his father can marry her."

Aḥmad said, "That is the way it is."

Ishāq said, "As he said."

- §170 I said to Aḥmad, "If a man owns two slave sisters and has intercourse with one of them and then gives her in marriage to another man, can he have intercourse with the other one?"

He said, "Yes, if he has eliminated the possibility of having intercourse with the first one by means of a marriage that makes her forbidden to him."

I said, "What if she is divorced and so is returned to him?"

He said, "He does not have intercourse with either one of

³³For one instance of this tradition, see Ibn Hanbal, *Musnad*, 1:300.

³⁴See *El*, s.v. "Zinā," where Schacht says a husband who finds his wife and another man in *flagrante delicto* is not punished for killing them. See Ibn Hanbal, *Musnad*, 1:435, for a tradition that says such a husband must find four witnesses.

them until he has made the body of the other forbidden to himself."

Ishāq said, "As he said in both situations, because he must eliminate the possibility of having intercourse with one of them."

- §171 I said, "Sufyān was asked about a man who buys a stolen female slave and then has intercourse with her and she becomes pregnant by him. He was asked what happens if her owner appears. He said that the owner is given the price of the female slave because [in this case, his property has been] destroyed."

Ahmad said, "The female slave is returned to her original owner, and the new owner ransoms his child slave for slave."

Ishāq said, "As he said."

- §172 I said, "[What if] a man says to his wife, 'You are divorced like one thousand [divorces]?'"

He [Ahmad] said, "I think that means three [divorces]."³⁰

- §173 I said, "[What if] a man swears [something silently], but says aloud something other than that which he was thinking and intended to say?"

Ahmad said, "I do not know."

I asked him again, and he said, "I prefer that the statement in this case be allowed."

Ishāq said, "His oath is in accordance with his intentions, because he made a mistake in speaking."

- §174 I said, "Does a woman nurse a child for more than two years?"

Ahmad said, "No, it is reprehensible." Then he adduced as proof the *hadith* of 'Alqama. He said [also], "The Qur'ān has revealed [something on nursing]."

Ishāq said, "As he said, because nursing is not lawful for more than two years."³¹

- §175 I said, "What if a man's wife asks him for a divorce and he then begins to beat her and say, 'This is your divorce.'"

Ahmad said, "This is legally binding for him, because it is said, 'Three [things] in which there is no joking'. . .³² Whoever swears so that he says one thing and thinks another, when he says, 'This is your divorce, this is your divorce,' that is valid and she separates from him."

Ishāq said, "A valid divorce does not result from his saying to her, 'This is your divorce,' while beating her, because this is simply an expression on the part of the husband to his wife. He says, 'You want a divorce and my beating you is your divorce.' This has no legal force."

- §176 I said, "What if a man says to his wife, 'You are free'?"

Ahmad said, "If this is a divorce statement, I fear that it is triple."

Ishāq said, "Whenever he intends a divorce by his saying, 'You are free,' then it occurs. But if he does not intend a divorce, then it does not occur. If it does occur, it is only in accordance with his intention (i.e., single, double, or triple)."

- §177 I said to Ahmad, "What if a man has four wives and says to them, 'You are divorced, three times?'"

He said, "I can think only that they are [all] triply divorced from him (*binna minhu*)."

Ishāq said, "They are indeed triply divorced from him, unless he intended to divide the three divorces among them."

- §178 I said, "A man says to his wife, 'You are divorced whenever (*kullamā*) you wish,' or he says, 'You are divorced when (*idhā*) you wish. 'When you wish' means that she can take advantage of her option once (i.e., for a single divorce). 'Whenever you wish' means she can divorce herself between one and three times."

Ahmad said, "Correct, as long as he has not had intercourse with her. Once he has had intercourse with her, she can no longer exercise the option of divorcing herself from him."

Ishāq said, "As he said, unless there has been intercourse."

I said, "[What if] a man says to his wife, 'You are divorced if (*in*) you wish?'"

Ahmad said, "If she wishes, then she is divorced when she says, 'I wish to be divorced [*qad shi'tu'l-falāq*].' This constitutes a single divorce."

Ishāq said, "As he said."

I said, "[What if] a man says to his wife, 'You are divorced if you wish,' and she says, 'If my father wishes?'"

He said, "It has no effect. She has rejected the opportunity."

Ahmad said, "Her statement does not have any effect."³⁶

I said, "Has she rejected the opportunity [to divorce herself from her husband]?"

He said, "Yes."

Ishāq said, "As he said."

- §179 I said, "If a man sells his wife, is she separated from him?"

Ahmad said, "No, but he has done something inexcusable, something very grave."

Ishāq said, "As he said."

³⁰ See Qur'ān 2:232 for regulations regarding nursing infants.

³⁶ It is not clear whether this is a repeat of Ahmad's opinion or the previous statement is Ishāq's.

§180 I said [to Sufyān], "What about a man who divorces his wife and then is asked whether he plans to return to her? [What if] he says, 'I have not divorced her and I want to return to her, and if I wanted to return to her, I would not have divorced her,' and he intends by all that a divorce?"

He said, "It has no effect."

Ahmad said, "Nothing happens in this case."

Ishāq said, "It is in accordance with what the man said, because the legal effects [of whatever he says] are in accordance with the man's intention."

§181 I said [to Sufyān], "What if a man says to his wife, 'If you give birth to a girl, you are divorced, and if you give birth to a boy, you are divorced doubly?' Then she gives birth to a girl, then to a boy. If she gives birth to the girl first, then she is divorced singly, but no divorce occurs when she gives birth to a boy because she, when she actually gives birth to the boy, is separated from her husband and her *'idda* is over, and she herself may be asked for her hand in marriage. [But] what if she gives birth to a girl and her husband returns to her before the boy is born?"

He said, "If he does that, she is triply divorced and is not lawful to him until she has been married to another man."

Ahmad said, "It is in accordance with the husband's intention," and he did not at all agree with the problem as I had related it to him. He said it was in accordance with the intention of the husband, for he meant by that a single divorce.

Ishāq said, "As he said."

§182 I said, "If a woman is divorced singly and then menstruates once or twice and then her husband returns to her but divorces her again before having intercourse with her, is her *'idda* started all over again?"

Ahmad said, "Yes it is."

Ishāq said, "As he said."

§183 I asked, "Is the witnessing of one man and two women legally valid in cases of divorce?"

Ahmad said, "No, by God, it is not."

Ishāq said, "Yes, it is."³⁷

§184 I said, "Sufyān said the following concerning a man who divorces a woman singly, and the woman then gives birth two years later. He said, 'She is his wife, because pregnancy can result only

from intercourse. If she gives birth in less than two years, she then has the right to herself. If she gives birth in more than two years, the child belongs to the [former] husband, and she remains [upon giving birth] separated from him."

Ahmad said, "If she gives birth after two years, the child belongs to the [former] husband, and she remains separated from him."

Ishāq said, "As he said."

§185 I said, "Sufyān said the following concerning a man who marries a woman who has a son by a previous marriage and then the son dies: 'If she gives birth to a child in under six months [after this marriage], he need not make him an heir, unless definite proof [can be established that the child is his].'"

Ahmad said, "He can withhold himself from his wife (i.e., to learn whether she is pregnant), but if he does not and she gives birth in more than six months, I do not know whether or not he is the child's father."

Ishāq said, "If it is in [under] six months, then the matter is as Sufyān said."

§186 I said, "Sufyān gave an opinion about a man who has intercourse with his wife, but then two years pass during which he does not have intercourse with her. Then he divorces her singly. He was asked whether the man could [under these circumstances] return to his wife or inherit from her, and he said that he could do neither."

Ahmad said, "He can return to her, and mutual rights of inheritance prevail between the two of them, and she must wait an *'idda* [if he divorces her singly], once the door has been locked and the curtain drawn. For then the same obligations prevail between them that would prevail if there had been intercourse (i.e., during this two-year period)."

§187 I said, "Sufyān said, 'They do not relate that there is any harm in a man's divorcing his menstruating wife before having had intercourse with her, for then she need not wait an *'idda* because of having been married to him.'"

Ahmad said, "I do not approve of this."

Ishāq said, "A man's divorcing his menstruating wife before having intercourse with her is not at all what Ibn 'Umar related; it is like what Sufyān said."

§188 I said, "If a man who is ill divorces his wife before having intercourse with her, mutual rights of inheritance do not prevail between them."

³⁷ However, see Ibn Hanbal, *Musnad*, 2:35, for a tradition that says this combination is adequate for questions of nursing and foster-relationships.

Ahmad said, "Full rights of inheritance prevail between them and she waits an *'idda*, for such a man is terminally ill (*firār*)."

Ishāq said, "As he said."

- §189 I said, "Sufyān said that slave women, Christian women, and Jewish women all receive a compensatory gift from a free man when they are divorced."

Ahmad said, "Every divorcee receives a compensatory gift when she is divorced, if her husband has not had intercourse with her and has not otherwise made an allocation for her."

- §190 I said, "[Sufyān was asked about] a man who has put his wife's matter into the hands of another man and does not know what that man has done about it. [He was asked whether] the husband has the right to have intercourse with his wife before he finds out what her status is. He said, 'Yes.'"

Ahmad said, "No, he should not have intercourse with her, until he knows what her status is."

Ishāq said, "As he said."

- §191 I said, "Are a man's saying to his wife, 'Choose!' and 'Your matter is in your hands' the same?"

Ahmad said, "No. When a man says to his wife, 'Your matter is in your hands,' then she decides what her status is to be. But when he says, 'Choose!' and she chooses herself, that counts as a single divorce, and he has the right to return to her."

Ishāq said, "No, the two formulas are the same if he intends by putting his wife's matter into her hands what he intends by telling her to choose. And if he had no certain intention, nothing happens, [as] if he were to say, 'I give you the choice of eating something.'"

- §192 I said, "What about a man whose wife gave him one thousand dirhams in return for his saying to her, 'Choose!' If she chooses her husband, does he return the thousand dirhams to her?"

Ahmad said, "He does not return anything to her, and whatever she has effected for him is incumbent upon him, even if she has granted herself a divorce. Further, the nature of the divorce is in accordance with whatever she has uttered concerning it."

Ishāq said, "It is as he said."

- §193 I said, "Sufyān said that if a man said to his wife either 'Choose!' or 'Go!' or 'Your matter is in your hands,' or 'Join [your people]!' or 'Get out!' the legal consequences of the husband's statement are in accordance with his intention. He is asked about it, and if he meant a divorce, then a divorce occurs and if he did not, then nothing happens."

Ahmad said, "I am afraid that each of these statements produces a triple divorce, since it is uttered harshly, like a man's saying to his wife that she is *khaliya*, *bariya*, or *bā'ina*."

Ishāq said, "In accordance with what Sufyān said, the legal consequences of these statements reflect the husband's intention, because they are expressions that resemble divorce expressions, and in cases where a man employs such expressions they are understood on the basis of what he intended."

- §194 I said, "If a man puts his wife's matter into the hands of two men and one of them divorces her triply and the other singly, that is not permissible."

Ahmad said, "They concur on a single divorce."

Ishāq said, "As he said."

- §195 I said, "Sufyān said that if a man says to his wife, 'You are forbidden to me (*anti 'alaiya ḥarām*),' the statement can be construed in three ways: [First,] if he intended by his statement a divorce, then it counts as a divorce; if he intended an oath, then it counts as an oath; and if he intended neither a divorce nor an oath, then his statement is a falsehood."

Ahmad said, "Abū Hanīfa's doctrine is that all of these possibilities make necessary expiation for the oath of *ḡhār*."

Ishāq said, "When a husband does not mean by a *ḥarām* statement an oath, then it is not an oath, but it makes his wife forbidden to him in accordance with his intention; it counts as a triple divorce if he intends it as such, or as less than a triple divorce if he intends it as such."

- §196 I said, "Sufyān said that if a husband says to his wife, 'You are released (*bariya*) from me,' and he intended by this statement two divorces, it counts as a single or a triple divorce."

Ahmad said, "I am afraid that it is a triple divorce."

Ishāq said, "It counts as the husband intended it to; if he intended a single definite divorce, then it is; if double, then it is; and so on."

- §197 I asked whether it were reprehensible for a woman to perform the pilgrimage during her *'idda*.

Ahmad replied, "There is no harm in it."

Ishāq said, "It is as he said, when she is waiting her *'idda* following a divorce with *batta*."

- §198 I said, "Sufyān said that when a man divorces his wife triply while ill, then recovers, and then dies, his wife inherits from him, but if she dies, he does not inherit from her. Is that correct or not?"

Abmad said, "Yes, it is as he said."

Ishāq said, "As he said, because the man in this case was terminally ill and the woman was not."

- §199 I said, "When a man divorces his wife singly or doubly while ill, then recovers during her *ʿidda*, then divorces her a third time, the couple do not inherit from each other."

Abmad said, "Yes [this is correct]."

Ishāq said, "As he said."

I said, "That means that if he had divorced her singly or doubly while healthy, and then he became ill and divorced her a third time and died during her *ʿidda*, she would inherit from him."

Abmad said, "Yes, she would inherit from him after the end of her *ʿidda*."

Ishāq said, "As he said."

- §200 I said, "What if a man has four wives and divorces one of them triply, another doubly, and another singly and then dies, without it being known which of them was divorced triply, which doubly, or which singly? (Sufyān) said that all of them inherit from him."

Abmad said, "They draw lots and whichever one loses does not inherit."

Ishāq said, "As he said."

- §201 I said, "What if a Christian woman is married to a Christian man and converts to Islam?"

Abmad said, "The couple are separated."

I said, "What if her husband converts to Islam while she is waiting her *ʿidda*?"

Abmad said, "Then her husband has the right to remain married to her."

Ishāq said, "As Abmad said. As for the Magian woman, if she converts to Islam and her Magian husband does not and a Muslim man marries her with the consent of her *walī*, that is allowed without a judge (*hākim*) separating her from her Magian husband, unless the marriage takes place during her *ʿidda*. Then it is not valid. But if her *ʿidda* ends, and the Magian man has not converted to Islam, then what was between them is over, and whoever wishes may marry her in a valid marriage with a *walī* and witnesses.

[Ishāq said,] "But if the Magian husband is absent when his wife converts to Islam, and he does not know of her conversion, then she waits until he learns of it, because possibly he will wish to convert to Islam out of a desire to remain married to her. If he does convert during her *ʿidda*, then they remain married on

the basis of their previous marriage. They do not need to remarry.

[Ishāq said,] "A Magian is married to a Magian woman for five months before she converts to Islam. Then a Muslim marries her, and she gives birth exactly nine months after the Magian has had intercourse with her. Then the Magian claims the child is his, and the Muslim claims the child is his. In that case the child belongs to the Magian, and he is a Muslim because his mother is a Muslim. The reason for this solution is the well-known fact that women do not give birth in four months. In this instance the woman spent four months with her Muslim husband, so his claim is not valid and the claim of the Magian takes precedence because of our certainty that she became pregnant when she was his possession. We make the child Muslim because his mother is. A child of mixed parentage is always a Muslim; the *sunna* has stipulated (*naṣṣat*) that, on the authority of 'Umar b. al-Khaṭṭāb and 'Umar b. 'Abd al-'Azīz. And the same thing has been related on the authority of the Prophet in the story about Rāfi' b. Sinān when he converted to Islam and his wife refused to."³⁸

- §202 I said, "What if a woman menstruates once during [the period of her *ʿidda* which she is reckoning in terms of] months, is her *ʿidda* then reckoned in terms of menstrual periods?"

He [Abmad] said, "Then her *ʿidda* is reckoned in terms of menstrual periods."³⁹

Ishāq said, "As he said."

- §203 I said, "For how long does a slave fast to expiate an oath of *zihār*?"

Abmad said, "He fasts for two months."

Ishāq said, "He spoke correctly, for it is not a question of *ilā*."⁴⁰

- §204 I said, "What about the *ḥadīth* of Tāwūs on the authority of Ibn 'Abbās that during the lifetime of the Prophet, a triple divorce could be based on a single one?"

He [Abmad] said, "All of the companions of Ibn 'Abbās related opinions contrary to what Tāwūs said. Further Sa'īd b. Ju-

³⁸ See Abū Dāwūd, *Sunan*, 2: 226–227, for this story: Rāfi' and his wife had a daughter. When the wife refused to convert, the Prophet placed the girl between them and told each to call her. They did so, and the girl at first turned toward her mother. However, when the Prophet asked God to guide her, the girl turned toward Rāfi', who then kept her.

³⁹ Ibn Rāḥwayh thinks the period of *ilā* is halved for a slave. See above, 1K 53.

bair and Mujāhid and Nāfi' related on the authority of Ibn 'Abbās contrary to that—to his saying. . . .³⁹ [As for] Fāṭima bt. Qais, she was divorced triply in accordance with what both al-Sha'bi and Ibn 'Umar related on the authority of the Prophet concerning the man who divorces his wife triply: He [the Prophet] said, 'Until you have had intercourse.'

I said to Ahmad, "Is this connected [with the *ḥadīth*]?"

He said, "No, only Tāwūs related that."

Ishāq said, "The *ḥadīth* of Ibn 'Abbās on the authority of the Prophet concerning divorce was not related by any of the Companions in a version contrary to Tāwūs's, rather they related what the Prophet said without explaining whether the woman being divorced was one with whom her husband had or had not had intercourse. If Tāwūs's version is considered in terms of a woman whose husband has not had intercourse with her, then it is not contrary to Ibn 'Abbās's version. As for the *ḥadīth* of Fāṭima, it is not clear whether her husband divorced her triply with a single utterance; nor does it say in Ibn 'Umar's *ḥadīth* 'until intercourse the divorce is triple.' We consider the *ḥadīth* of Tāwūs in terms of the woman whose husband has not had intercourse with her because of what 'Ikrima related on the authority of Ibn 'Abbās, distinguishing between the two of them, and what 'Amr related on the authority of Jābir and 'Atā' concerning the woman whose husband has not had intercourse with her: 'Triple divorce is a single one.'⁴⁰

§205 I said, "What about His saying, *In that which . . . ye proclaim . . . concerning your troth with women* (2:235)?" I asked him what a man was permitted to say.

He [Ahmad] replied, "A man may say, 'You are very beautiful,' or, 'You are charming,' or, 'May you find good, God willing,' but he must not ask for her hand explicitly."⁴¹

³⁹The Arabic text of this response is difficult, but it seems to combine two issues: divorce after a marriage contract has been concluded and before intercourse has taken place, and triple divorce pronounced all at once. See Abū Dāwūd, *Sunan*, 2:214–215, for divorce before intercourse and whether such a divorce is single and definite, or triple. The scholars mentioned here are also mentioned in his *isnāds*. Abū Dāwūd, in addition, includes a tradition with an *isnad* from Tāwūs on the authority of Ibn 'Abbās, that during the lifetime of the Prophet, the caliphate of Abū Bakr, and the first two years of the caliphate of 'Umar, three divorces were pronounced all at once. See also Ibn Hanbal, *Musnad*, 1:314, for the same tradition, and Ibn Qudāma, 8:243, for discussion of this issue.

⁴⁰Qur'an 2:235 is understood in conjunction with 2:234 to refer to asking the hand of a widow in marriage during her 'idda. See Bell, *Commentary*, 1:49, and Burton, *Sources*, p. 63.

Ishāq said, "As he said."

§206 I said, "Sufyān was asked about a man who marries a woman during her 'idda. He said that in this case, if she gives birth, the child belongs to her first husband. He was asked whether this was the case even if the child was born a year later. He said it was. He was asked if it was the case even if the child was born two years later, and he said that it was."

Ahmad said, "Yes, [this is correct] as long as the ending of her 'idda was not firmly established."

Ishāq said, "As he said."

§207 I said, "What about a woman who is with her husband and bears his child, then says that she wants to nurse the child and her husband says no? Does he have the right to his child so that he has the right to look for a wet nurse?"

Ahmad said, "She has the right to her child. [Further,] if she refuses [to nurse it], he cannot force her to, and if *ye make difficulties for one another* (65:6),⁴² then he should look into what the appropriate compensation would be for her [for a wet nurse] to nurse [the child] and pay it to her. That is what she is owed in the case of a divorce."⁴²

Ishāq said, "It is as Ahmad said."

§208 I said he said: "Sufyān was asked what he thought about a man who says to his wife, 'You are divorced like this house.' He said that this constituted a single divorce and the man had the right to his wife. He was [asked what the situation would be] if the man had intended a triple divorce. He replied that it was a single divorce."

Ahmad said, "When his intention toward her is hostile, in the sense that he wants her to be permanently separated from him, then this is a triple divorce. But when he says it to be vehement or severe, then it is a single divorce, unless he says, 'You are divorced *al-batta* or *bā'ina*,' then I fear that his statement produces a triple divorce."

Ishāq said, "Whenever a man says anything of that kind, his statement is understood in accordance with what he intended,

⁴²Kausaj's question is compressed. Ibn Hanbal answers it by assuming that the woman in question has been divorced by her husband while pregnant and that her 'idda ended with her delivery. That leaves the question of her maintenance while she is nursing their child. This matter is taken up in Qur'an 65:6. Bell says of the phrase Ibn Hanbal quotes here that once the child is born, the couple "are to arrange if possible for the mother to suckle the child for an agreed reward, but if they cannot agree, another woman may be engaged to suckle it, at the father's charge" (Bell, *Commentary*, 2:394–395). See, in addition, his comments on 2:233, in *Commentary*, 1:49.

so he is asked to swear with regard to what his intention was at the time he spoke."

- §209 I said, "[What about] a man who repudiates a female slave of his' by means of *zihār*? He [Sufyān] said, "This is an instance of *zihār*."

Aḥmad said, "No, it cannot be an instance of *zihār*, unless he has repudiated a wife."

Ishāq said, "As he said."

- §210 I said he said: "I heard him [Sufyān] say that if a man marries a woman when he is in a state of *iḥrām*, or she is menstruating, or it is Ramaḍān, and then she claims that sexual intercourse has occurred, she obliges him to pay the dower."

Aḥmad said, "[Yes,] when the door has been locked and the curtain drawn."

Ishāq said, "Locking the door and drawing the curtain do not oblige a husband to pay the dower when there is an impediment to sexual intercourse, caused by Ramaḍān, menstruation, or *iḥrām*."

- §211 I said, "Sufyān was asked about a man who says to his wife, 'You are divorced; indeed you are divorced (*anti ṭāliq; bal anti ṭāliq*).' He was asked whether these statements created two divorces and he said that they did, that *anti ṭāliq, bal anti ṭāliq* was straightforward speech. I asked about the effect of the statement *bal anti ṭāliq*, and he said [in itself] it constituted a single divorce."

Ishāq said, "As he said."

- §212 I said, "Sufyān said that the divorce procedures for the *umm al-walad* and the *mudabbara* are the same as those for the slave. Also, they wait the same *ʿidda* whether they are widowed or divorced."

Aḥmad said, "That is correct."

Ishāq said, "As he said."

- §213 I said, "Sufyān said that if a husband has intercourse with his wife without her knowing that she has the option of choosing to be separated from him (*al-khiyār*), she is asked to swear that she did not know of this option during intercourse. If she swears she did not, then she is given the option of separating from him. If she did know of her option, she has lost it by the act of intercourse."

Aḥmad said, "If her husband has had intercourse with her, the wife in question no longer has the option of separating from him, regardless of whether she was aware of her option before the act of intercourse."

Ishāq said, "As Sufyān said."

- §214 I said, "Sufyān said that when a female slave is manumitted, she is given the option of remaining with her master, whether he be a slave or a free man. If she chooses herself and her master has not had intercourse with her, then she receives no dower, because she is the one who initiated the separation. But if she chooses her husband, then she does receive a dower. But the dower belongs to her master when a female slave marries. Further, if her husband or owner has had intercourse with her, the dower, if she chooses to stay with him, belongs to her master."

Aḥmad said, "When she is a slave, her dower immediately belongs to her master. If she is owned by a free man, *takhyir* is not applicable to her."

Ishāq said, "As Aḥmad said."

- §215 I said, "Sufyān said, 'When a female slave is manumitted and she knows then and there (*fī majlisihā*) that she has the option [of separating from her husband] but does not choose to exercise her option immediately, she loses it.'

Aḥmad said, "Her option lasts as long as her husband has not had intercourse with her."

- §216 I said, "Umar said that if a bedouin marries a slave, his children do not become slaves, he ransoms them."

Aḥmad said, "I do not say anything about the bedouin. There has been disagreement about this matter." Then he mentioned the *ḥadīth* about the sons of Muṭalīq when the Prophet manumitted them, and he mentioned the *ḥadīth* about ʿĀʾisha when it was her duty (*ʿalaihā*) to manumit four of [those] who were emancipated from among the sons of Ismāʿīl.

Ishāq said, "As Sufyān said, because ʿUmar said, 'A bedouin does not own chattels (*milk*).' ʿUmar held that the children [in such an instance] should be ransomed, and this is the obvious truth."

I said, "He [Sufyān] said that ʿUmar said, 'The sons of a *maulā* are slaves.'"

Aḥmad said, "As for the *maulā*, there is no disagreement about him that his children are slaves if he has been married, unless. . . ."

- §217 I said, "Sufyān said the following about a man who buys a stolen female slave and has intercourse with her, and then she becomes pregnant: 'Her [original] owner is owed her price, because [in this case his property has been] destroyed.'"

Aḥmad said, "Any children belong to the buyer because he [bought in good faith and] was deceived, and he should not have

to ransom them. Further, the slave is returned to her original owner, and the buyer pays an indemnity (*al-ʿuqr*) for having had illicit sexual relations with her."

I said, "As a dower?"

He said, "Yes, and the buyer has recourse against the one who deceived him."

Ishāq said, "Just as he said."

§218 I said, "Sufyān said the following about a man who marries a female slave and then her owners say, 'She will work by day, and we will send her to you at night.' [Sufyān said,] 'Her husband must maintain her as long as she stays with him.'"

Aḥmad said, "There is no escape from his maintaining her as long as she remains with him, that is at night, and the condition (i.e., that she work by day) is not faulty."

Ishāq said, "As he said, because the condition in this [contract] is valid, since it neither forbade what is allowed nor allowed what is forbidden."

§219 I said, "Sufyān said that when a man wishes to give his female slave in marriage and he has not had intercourse with her, then let him give her in marriage without it being necessary for her to wait an *ʿidda*. Further, if he sells her, the buyer buys her [right away]."

Aḥmad said, "This is sound."

Ishāq said, "As he said."

§220 I said, "Sufyān said that when a man gives his *umm al-walad* in marriage, he does so only after he has waited an *istibrāʾ* of one menstrual period. Then if he gives her in marriage and her husband has intercourse with her and dies, she waits an *ʿidda* because of his death and then returns to her master."

Aḥmad said, "As he said."

Ishāq said, "As he said."

I said, "Sufyān was asked about a man who gives his *umm al-walad* in marriage before waiting an *istibrāʾ* of one menstrual period and then dies before her husband has had intercourse with her, and then her husband separates from her before he has had intercourse with her. [He said that] she need not wait an *ʿidda* either on account of her husband or on account of her master."

Aḥmad said, "As he said."

Ishāq said, "As he said."

Aḥmad said, "However, if her husband dies before having intercourse with her, she does not inherit from him, but she is entitled to her entire dower, and she waits an *ʿidda* of two

months and five days. Further, if her late husband did not fix the amount of her dower, she receives a fair dower for a woman of her status. The same would hold true for the *mudabbara* and the *mukātaba*."

Ishāq said, "As he said."

§221 I said, "Sufyān said, 'When a man dies leaving behind a concubine who has borne him children (i.e., an *umm al-walad*) and who is menstruating at the time of his death, this menstrual period does not count toward an *ʿidda*. She must wait three additional menstrual periods. She may go out, use perfume, and be sought in marriage, but she may not be given in marriage until she has completed three menstrual periods.'"

Aḥmad said, "She waits an *ʿidda* of one menstrual period, because she is neither a divorcee nor a widow. Since she is a slave, there should be an *istibrāʾ* of one menstrual period; an *ʿidda* is not required of her. She may go out, use perfume, and be sought in marriage, but she cannot marry until she has completed one menstrual period."

Ishāq said, "She waits an *ʿidda* of four months and ten days, because the death of her master has made her a free woman. [This is in accordance with] the *ḥadīth* of 'Amr b. al-ʿĀṣ."

§222 I said, "Sufyān said, 'When a man gives his *umm al-walad* in marriage and then her master dies before her husband has had intercourse with her, she is given a choice (*khuyyirat*). If she chooses herself, she receives no dower, nor does her master (i.e., his estate). If she chooses her husband, then her master receives the dower. Further, if her husband had intercourse with her before her master died, she is given the same choice and the dower belongs to her master.'"

Aḥmad said, "Yes, as he said."

Ishāq said, "As he said."

§223 I said, "I asked Sufyān about a man who marries a woman who has become pregnant because of [her having been taken into] captivity or because illicit relations [have been imposed upon] her: [I asked], 'Is his marriage valid?' Sufyān replied, 'The couple are separated.'"

Aḥmad said, "Good."

Ishāq said, "As he said."

Aḥmad said, "But that is not a divorce. When she has given birth, if the man in question wishes, he may seek her hand in marriage if he has not had intercourse with her. But, if he has had intercourse with her, they are separated, she receives a

dower, and they are punished. Then, if he wishes he may seek her hand after she has given birth and waited an *ʿidda* of an appropriate length from her last husband."

Aḥmad said, "But if she is not pregnant and married during her *ʿidda*, she and her husband are separated, she receives a dower as compensation for his having had intercourse with her, and the two of them are punished. Further, if she has given birth from having had intercourse with the second [i.e., illegal] husband more than six months after she has had intercourse with him, then the child is his. If both husbands claim the child, physiognomists are called and the child is given to his father."

I said, "On behalf of whom does she wait this *ʿidda* which ends with her giving birth?"

He said, "This is the *ʿidda* on behalf of the man who has been established as the child's father. Then she must also wait an additional *ʿidda* of three menstrual periods, because she has had intercourse with two people."

Iṣḥāq said, "As he said. Indeed, the two of them are punished if they knew she was still waiting an *ʿidda* [when they had intercourse]."

§224 I said, "Sufyān said, 'When a woman is given to a man (*wuḥib-at*), or she is given as a charitable gift (*yusaddaḡu bihā*), or a man inherits or buys her, he may not have intercourse with her until he has waited a period of *istibrāʾ*. Further, when he sells a female slave and she is returned to him because of a fault or any other reason, he does not have intercourse with her until he has waited a period of *istibrāʾ* if her new owner had in fact taken possession of her."

Aḥmad said, "What he said is excellent."

Iṣḥāq said, "As he said."

I said, "Al-Ḥasan said that whenever a man buys a female slave while she is menstruating, he (i.e., al-Ḥasan) is satisfied with that menstrual period [as an adequate *istibrāʾ*, but] Sufyān said, 'Our companions used to say, "Until she menstruates another complete menstrual period."'"

Aḥmad said, "This is sound; that is, Sufyān's doctrine is sound."

Iṣḥāq said, "What we choose [in this case] is what al-Ḥasan said: 'If a man buys a female slave while she is menstruating, both the seller and the buyer should be satisfied with that menstrual period.'"

I said, "Sufyān said that when he buys her from a woman, a man should still wait a period of *istibrāʾ*, because it is the *sunna* for him to do so."

Aḥmad said, "Good."

Iṣḥāq said, "As he said."

I asked, "What if a man buys a female slave who does not menstruate?"

Aḥmad said, "He waits an *istibrāʾ* of three months."

Iṣḥāq said, "As he said."

I said, "Sufyān said, 'When a man buys a female slave who is of an age to menstruate but does not do so, then this constitutes a fault for which she is returned to the person who sold her to him.'"

Aḥmad said, "This is a fault for which she is returned."

Iṣḥāq said, "As he said."

I said, "Sufyān said, 'When a man buys an old female slave who is past the normal age of menstruation, he must wait an *istibrāʾ* of three months, but, if he wishes, one and one-half months, and [during this time] he may neither kiss her nor have sexual contact with her, because the *sunna* concerning one who buys a female slave is that he must wait an *istibrāʾ*. Even if she is among those who can be expected neither to menstruate nor to give birth, he must still wait an *istibrāʾ*."

Aḥmad said, "He waits an *istibrāʾ* of three months, because pregnancy does not become evident in less than three months, and the rest is as he said."

Iṣḥāq said, "The solution in that situation is that he wait an *istibrāʾ* of forty nights for a female slave [who does not menstruate], whether she is old, or young and hence just approaching the age when she might be expected to menstruate. If she does menstruate, but for some reason her menstruation is in abeyance, then he waits an *istibrāʾ* of three months because pregnancy does not become evident in less than three months. Al-Walid b. Muslim informed me of this on the authority of al-Auzāʿī on the authority of al-Zuhri."

I said, "Sufyān said, and he was one of those among the scholars (*ahl al-ʿilm*) whose opinion was sought, that when a man bought a young female slave, one considered too young for sexual intercourse, that it was not necessary for her to wait an *ʿidda*. He said, 'What I prefer when a man buys a female slave too young for intercourse is that her new owner should neither kiss

her nor have sexual contact with her, until he has waited a period of *istibrāʾ* on her behalf, in accordance with the *sunna* [concerning female slaves]."

Ahmad said, "What Sufyān said is excellent."

Ishāq said, "There is no harm in his kissing her and having sexual contact with her, because she is among those whom one need not fear having to return to her previous owner because of pregnancy. Further we see no harm in kissing and having sexual contact with a mature female slave before the period of *istibrāʾ* is over, in accordance with the *ḥadīth* of Ibn 'Umar."

I said, "Sufyān was asked about a man who buys a female slave who is of an appropriate age for menstruation, but who has not yet menstruated. He said, 'There are those who say that her owner should not approach her for two years—the longest possible time in which women give birth—or until she menstruates.'"

Ahmad said, "Since what is wanted from the situation is that it be ascertained that she is not pregnant, he should wait an *istibrāʾ* of three months."

Ishāq said, "As Ahmad said."

§225 I said, "Al-Hasan said concerning a man who says to his wife, 'You are divorced *in shāʾ Allāh*,' that this divorce has legal consequences for him. But Sufyān, when asked about this, did not give an opinion on it."

Ahmad said, "I too do not give an opinion on this matter."

I said, "Why?"

He said, "Divorce is not an oath."

I said, "Is the same true of manumission?"

Ahmad said, "Yes, if a man means in either case to employ a ruse (*tahayyul*) in his statement, then he should expiate his oath, and return to his wife or countermand his manumission."

Ishāq said, "His having said '*in shāʾ Allāh*,' avails him, and neither manumission nor divorce takes place. This is because, even though [statements of] divorce and manumission do not have the significance of oaths, they are actions on a man's part preceded by a *niyya* concerning them—which is that neither divorce nor manumission should take place, because his statements included '*in shāʾ Allāh*.'"

Ishāq continued, "As for the matter of saying '*in shāʾ Allāh*,' as part of a divorce statement, the scholars of Madina and Iraq have disagreed on it. Mālik and those of the Iraqis who followed him such as Ibn Abī Lailā and the likes of him, and, from the scholars of Syria, Auzāʿī and his like, held that divorce does oc-

cur when a divorce statement is accompanied by the statement '*in shāʾ Allāh*,' and a man's saying '*in shāʾ Allāh*' is of no avail. Further, they held, as far as we know, and God knows best, that divorce is an action, and that *istithnāʾ* is [valid] only in oaths. Among those who preceded them in their doctrine are [scholars] like Saʿīd b. al-Musaiyab and those who came after him.

"Those who think that *istithnāʾ* is valid are [scholars] such as Ibrāhīm and Tāwūs and their like (*wanuzarāʾihim*), including al-Thawrī, who followed them and adopted their doctrine. They were of the opinion that *thunyā* in divorce is valid, and this is the doctrine we support: that *thunyā*, even though it be, as they have claimed, [valid only] in oaths and not in actions, has this interpretation. It [*thunyā*] represents the wish of the swearer. And the import of his speech is based on what was prior [to it] from his wish. And the general [doctrine] regarding divorce is that it occurs only on the basis of wishes after [which] take place the utterances which express the wishes and agree with them. Therefore when a man says, 'You are divorced *in shāʾ Allāh*,' we know that what he has shown from the *thunyā* is that his wish is that he not be divorced, and the matter is in accordance with what he wishes. This is the better of the two doctrines in our opinion, and God knows best."⁴³

§226 I said, "Al-Hasan said concerning a slave who runs away and who has a wife, that this constitutes a separation [of the couple]."

Ahmad said, "It is neither a separation, nor a sale, nor a gift, nor a charitable donation, nor an inheritance, unless the slave is manumitted. But if the wife has been manumitted and was the property of a slave, she is given a choice and if she chooses herself, then that is a separation; anything other than that is not a separation."

Ishāq said, "As he said."

§227 I said, "Sufyān said, 'When two unbelievers are married and then convert to Islam, they remain married.' He [also] said, 'The one who is still an unbeliever is given the opportunity to convert and if he refuses, the couple are separated. But if he accepts Islam subsequently, nothing is required except a new marriage contract.'"

Ahmad said, "No, her husband has the right to her if he accepts Islam during her *ʿidda*."

⁴³ Ibn Rāḥwayh seems to make the point here that a husband's divorce is based upon his intention (*niyya*) to divorce, and if he abdicates formulating an intention by attempting to shift responsibility to God, his divorce is not valid.

Ishāq said, "As Ahmad said."

§228 Ishāq was asked about a Magian who marries a minor Magian girl, then converts to Islam before having intercourse with her, and then dies before she attains her majority.

He said, "She receives the dower commensurate with the marriage contract, but the couple do not inherit from each other."

He was asked, "What if the Magian girl converted to Islam during her *'idda*?"

He said, "She is a minor with no understanding of Islam. But if she is a major and converts before his inheritance is divided up, then she should receive her portion of the inheritance both before or after her *'idda* has ended."

I said, "Al-Hasan said concerning [first,] a Christian woman who converts to Islam, but whose husband remains Christian, or [second,] a Magian woman married to a Magian man who accepts Islam before her husband has had intercourse with her, and he does not accept Islam, that [neither of the two women] receives a dower. Sufyān said, as did other scholars (*fuqahā*), that each woman receives half of the dower, even if her husband has not had intercourse with her, because she invited him to convert to Islam and he refused."

Ahmad said, "[These two women] receive nothing."

Ishāq said, "As he said."

§229 I said, "Al-Sha'bi said that every separation was a divorce. Sufyān said, 'What we prefer is that when a separation originates with the wife, it has no legal validity, but if it originates with the husband, it is a divorce.'"

Ahmad said, "Every separation between a man and his wife is a separation without a divorce, unless he has uttered a divorce [formula] such as his saying, 'You are divorced,' or he has given her a choice (*al-khiyār*), which constitutes a single divorce giving him the right to return to her, or he has put her matter into her hands, or the hands of another, so she either divorces herself or is divorced by the man into whose hands her husband has put her matter. As for *li'ān* and giving the female slave a choice, and *khub* and the [question of the] nursing mother (*al-murdi*), and the man who has intercourse with his wife's mother, and everything that makes it incumbent upon a man to separate from his wife, these are all [instances of] separation, and not divorce."

Ishāq said, "It is as he said, except for a husband's saying to his wife, '*Amruka biyadiki*.' The consequences of this formula are in accordance with the husband's intention. If he meant it to

result in a single divorce, then it does; if he meant two, then it is two divorces; if he meant that all of her affairs are in her hands, then the outcome is whatever she decides (*al-qadā' mā qadat*)."

§230 I said, "Sufyān was asked about a man who attempts intercourse with his wife, but does not succeed and then divorces her singly. [He was asked] whether he held that the husband could return to his wife. He said that the husband could not. I asked him about inheritance [in this case], and he said that [mutual rights of] inheritance did not prevail [between the couple]."

Ahmad said, "If the door has been locked and the curtain drawn, then the husband is in the same situation as one who has had intercourse with his wife."

I asked, "What if the door has not been locked and the curtain has not been drawn?"

Ahmad replied, "If he has been alone with her [it is assumed they have had intercourse]."

Ishāq said, "It is as Sufyān said, unless the door has been locked and the curtain drawn, and she has no physical condition that prevents intercourse."

§231 I said, "Sufyān was asked about [the matter of] a woman when she says that her husband is unable to have intercourse with her. He said, 'If she is a virgin, women should examine her, but if a *thayyib*, then an oath is exacted from the husband as to whether he has had intercourse with her.'"

Ahmad said, "This is sound."

Ishāq said, "As he said."

§232 I said, "How long is the *'idda* of the apostate's wife?"

Ahmad said, "Three *qurū*."

I said, "What if he has been killed?"

Ahmad said, "Then it is four months and ten days."

I said, "What if he repents?"

He said, "Then he has the right to her as long as she is in her *'idda*."

I said, "To whom does his inheritance go (i.e., if he is killed)?"

He said, "He is put to death, and his property is confiscated in accordance with the *ḥadīth* of al-Barā' b. 'Azīb."

I said, "What if he [simply] dies? Then to whom does his inheritance go?"

He said, "The same as if he is put to death."

I said, "What if he escapes?"

He said, "Then his property is frozen."

Ishāq said, "It is as Ahmad said, except in the case of his in-

heritance. His inheritance goes to his Muslim heirs, and the rest is as Ahmad said."

I said, "Sufyān said that if a married woman apostatizes before her husband has had intercourse with her, then she receives no dower and whatever [bond there] was between the couple is severed. The same holds true if the husband rather than the wife apostatizes."

Ahmad said, "Whatever was between them is completely severed, and she receives no dower, because there is no 'idda in this case since there has been no intercourse."

Ishāq said, "It is as he said."

I said, "Sufyān said, 'If a woman apostatizes and then returns to Islam, her husband can seek her hand with a new dower and a new marriage.'"

Ahmad said, "He has the right to her in any case, as long as she is in her 'idda."

Ishāq said, "It is as Ahmad said."

§233 I said, "Sufyān was asked about a man who has intercourse with a female slave of his who then bears him a child. [He was asked what happened if] the man then dies and he has neither claimed his child nor sold him. Sufyān replied, 'I do not know, except the child is legally the responsibility of the man in question.'"

Ahmad said, "The child is definitely his if it is certain that he had intercourse with the child's mother."

Ishāq said, "It is as he said, if the man's having had intercourse with the child's mother is definitely established. The Prophet awarded the child to [the master of] the slave in the case of 'Abd b. Zama'a, as well as in other cases."

§234 I said, "Sufyān was asked about a man who says to another, 'I will marry you to my minor daughter if her mother consents.' He said, 'I do not think anything occurs until the mother expresses her consent.'"

Ahmad said, "This is sound."

I asked, "What if a man says, 'I will marry you to my daughter, unless so and so disapproves or her mother disapproves'? I do not think disapproval is the same as consent."

Ahmad said, "I prefer in this case that the marriage take place."

Ishāq said, "In both cases, the consent or disapproval is ascertained. They are both conditions."⁴³

⁴³In this case, neither condition interferes with the conclusion of a valid marriage contract. See also below, IK 285.

§235 I said, "Sufyān said in the case of a man who gives his absent son in marriage, 'I do not think there are legal consequences, unless he says that his son ordered him to do so.'"

Ahmad said, "If the man says that his son ordered him to arrange a marriage and he is lying, I think that the marriage must be legally valid. [It is valid] regardless of whether the son has ordered his father to give him in marriage. However, if the son disavows the marriage, then the father is liable for half the dower."

Ishāq said, "It is as Sufyān said, unless the son is a minor, or he has indeed asked his father to arrange a marriage for him."

§236 I said, "Sufyān was asked about a man who marries a woman and then says, 'I have married a woman who is forbidden to me.' He said, 'I consider the marriage valid.'"

Ahmad said, "Yes."

Ishāq said, "If he wanted to lie or deceive someone, then the marriage is valid."

§237 I said, "Sufyān was asked about a man who gives his minor son in marriage and guarantees the dower but then dies without discharging this obligation. He said, 'The dower is demanded of the son. Then if he leaves this obligation undischarged, it is taken from his inheritance, and he is held responsible for it out of his share.'"

Ahmad said, "As he said."

Ishāq said, "Exactly as he said."

§238 I said, "What if a man marries a woman who is nursing a son she has had by another man and she wants to continue nursing her son?"

Sufyān said, "She cannot nurse him."

Ahmad said, "This is what I would say."

I said, "Should she abandon her son?"

Ahmad said, "She should find a wet nurse for him. Her husband married her in order to cohabit with her, not so that she occupy herself with nursing."

Ishāq said, "As he said."⁴⁴

§239 I said, "Sufyān said the following about a woman who is married and has a daughter and whose husband separates from her, so she then marries another man and gives birth to another daughter. When asked what happens if her husband's son (e.g., by another woman) wishes to marry his stepsister, her daughter, he replied that there was no harm in the son marrying

⁴⁴See Ibn Qudāma, 9:311–312, for discussion of this issue.

his stepsister from a former or future marriage of a wife of his father's."

Ahmad said, "There is no harm in his marrying a stepsister from a former or future marriage of a wife of his father's."

Ishāq said, "It is exactly as he said."

- §240 I said, "Sufyān said, 'When a [slave] woman's body is lawful for a man, so he has intercourse with her, but she is [really still] a slave of her former master, then the child she bears is a slave and its paternity is definite.'"

Ahmad said, "This is [an instance] of [a man's having acted in good faith, but having had] intercourse in error. The child is his and the slave [mother] is returned to her first owner."

Ishāq said, "As he said."

- §241 Ahmad was asked about a woman who makes a female slave of hers lawful to her son, so he has intercourse with her.

He said, "If he has intercourse with her, he destroys her property."

Someone said, "But he manumitted her."

Ahmad said, "I do not know [the answer in this case]."

Ishāq said, "When he has intercourse with her once and she becomes pregnant, then that is a case of property destruction. However, if he has intercourse with her and she does not become pregnant, then her manumission is valid."

- §242 Sufyān was asked about one man's witnessing in place of another in cases of divorce. He said, "I believe it is valid."

Ahmad said, "True. What he has said is excellent."

Ishāq said, "As he said, and that is the case in all legal judgments. One man's witnessing in place of another is valid, and Shuraib used to consider that valid and to call them the alternates (*al-mabādih*), that is, . . ."

- §243 I said to Ahmad, "Sufyān was asked about a man who was alone with his wife while she was menstruating. He said, 'She receives her full dower.' He was asked whether she would receive her full dower even if he were in a state of *ihram*, and he said, 'Even if he were in a state of *ihram*.'"

Ahmad said, "Yes, if the door has been locked and the curtain drawn."

Ishāq said, "She never receives her dower on the basis of privacy alone; unless privacy occurs when she is free (e.g., because she is neither fasting nor in a state of *ihram*)."

- §244 I said, "Sufyān was asked about a man who marries a woman for the dower of a female slave and then gives this female slave in marriage to one of his male slaves. [He was asked what hap-

pens if] the female slave gives birth and the man in question divorces his wife before having intercourse with her. He said, 'The wife receives half the price of the female slave and half the price of her children.'"

Ahmad said, "This is sound."

[I said,] "Sufyān said that it is not lawful for him to manumit the female slave before having intercourse with his wife."

Ahmad said, "It is not lawful for him to manumit her [at all], because when he married his wife, he made the female slave legally hers."

Sufyān said, "If the female slave in question is lacking something or has a fault, the [divorcing] husband splits the difference with her (i.e., the wife whom he is divorcing before intercourse). If he wishes, he can take half the price [of whatever dower he has given his wife]. So if he married her for a piece of land on which she has built a house, then he is entitled to half the price of the land. Or, if he married her for a piece of cloth which she has made into a garment, he is entitled to half the price of the material. And the same is true for similar cases, because [if the original object has been altered in any way,] it is [the same as the] destruction of property."

Ahmad said, "This is sound."

Ishāq said, "As he said."

- §245 I said, "Sufyān was asked about a man who says to his wife, 'On the day I leave the country, your matter is in your hands.' Then he leaves secretly without his wife's knowledge. Then after that she finds out that [he has left]. He said, 'I do not think anything happens in this case.'"

Ahmad said, "Her matter is in her hands whether he leaves secretly or openly. If he has put her matter into her hands, it is in her hands, as long as he has not had intercourse with her, in accordance with the *hadith* of Zaid."

Ishāq said, "Her matter is in her hands when he leaves, but if she did not know that [and so exercise her option to divorce or remain married to him, immediately] before the end of that particular conversation, her option ceases, unless her husband has specified some sort of time limit. If she learns of his departure after a day or more, she has no option, since she did not exercise it during that particular conversation."

He said:⁴⁶ Ishāq b. Manṣūr al-Marwazī related to us, he said:

⁴⁶The mss. do not name this transmitter from Kausaj. An intermediate transmitter appeared above in IK 208 and 210.

I said to Abū 'Abd Allāh Aḥmad b. Muḥammad b. Hanbal, may God have mercy on his soul, al-Auzā'ī said that if a man gives his wife the option of separating from him and then wants to take it back before she exercises her option, he can do so. But Sufyān said that he could not take it back.

Aḥmad said, "He can take it back, and the same is true if he puts her matter into her hands; he can take it back as long as she has not exercised her option."

Ishāq said, "It is as Aḥmad and al-Auzā'ī said."

§246 I said, "Sufyān said that if a man divorces his wife triply while ill, then [seems to] recover, and then dies, that she inherits from him; but if she dies, whether he recovers or not, he does not inherit from her."

Aḥmad said, "If he recovers, then she does not inherit from him."

Ishāq said, "Whenever divorce is originated while a man is ill, he is considered terminally ill. If he dies, she inherits from him, regardless of whether he recovers."

I said, "Sufyān said that if a man divorces his wife singly or doubly while terminally ill, then recovers during her *'idda* and divorces her a third time, the couple do not inherit from each other."

Aḥmad said, "He does not inherit from her."

I said, "Just as if he divorced her singly or doubly while healthy and then became terminally ill and divorced her a third time and then died during her *'idda*, she would inherit from him?"

Aḥmad said, "Correct. She would inherit from him."

Ishāq said, "It is as he said."

§247 I said, "Sufyān said concerning a man who marries a woman with whom he has intercourse, then marries another with whom he has intercourse and who is the mother of the first, that if he dies they both receive dowers but neither inherits from him."

Aḥmad said, "It is as he said and neither inherits from him."

I said, "He [Sufyān] said that if such a man has not had intercourse with the second woman, then the marriage with the first is valid and that with the second is invalid (*fāsid*), and the second neither receives a dower, nor inherits from him, nor is an *'idda* incumbent upon her."

Aḥmad said, "As he said."

Ishāq said, "As he said."

I said, "He [Sufyān] said that if a man marries a daughter and her mother in a single day and has intercourse with both of

them, they do not inherit from him, but both receive dowers and both wait the *'idda* of a triply divorced woman, three *qurū'*."

Aḥmad said, "That is correct, because, without death, this would be a case for canceling (*fashh*) the marriage, so we say neither waits a widow's *'idda*."

Ishāq said, "As he said."

§248 I said, "Sufyān said that if a man marries a *thayyib* and then a young virgin girl (*sabīya*), and the *thayyib* intentionally nurses the girl, his marriage with both of them becomes invalid (*fasadatā 'alayhi*). He is entitled to remarry the girl, unless he has had intercourse with the *thayyib*; but he can never marry the *thayyib* because she has become the girl's mother. When a man marries a girl, her mother is never lawful for him, regardless of whether he has had intercourse with the girl. [However,] when he marries the mother but does not have intercourse with her, he can marry the girl."

Aḥmad said, "This is sound."

Ishāq said, "Just as he said."

§249 I said, "Sufyān said, 'It is reprehensible to hire a wet nurse until a child is weaned, without a definite time [limit] being designated, or a definite sum of money named. Further, [payment of] clothing [in general] should not be stated without each article of clothing being enumerated.'"

Aḥmad said, "Yes."

Ishāq said, "As he said, except what he said about clothing. It is not necessary to enumerate each article. Many types of clothing will dress her [satisfactorily]."

§250 I said, "Is it reprehensible for a bastard child to be nursed by his [adulterous] mother's milk?"

Aḥmad said, "There are those (*qawm*) who have found it reprehensible."

I said, "But do you find it so?"

He said, "I will inform you (*ukhbiruka*) that 'One becomes like [by feeding] upon milk.'"

Ishāq said, "As he said."⁴⁷

§251 I said, "Sufyān said that if a man who already has a daughter by one woman marries another woman and then gives his daughter in marriage and then dies, his daughter's husband may, if he wishes, marry this widow of his wife's father."

⁴⁷ See Lane, *Lexicon*, s.v. "sh b h" (form 4), for reference to a tradition on the authority of 'Umar that one comes to resemble the woman by whose milk one has been nursed.

Ahmad said, "Yes, 'Abd Allāh b. Ja'far was married to a certain man's widow and this same man's daughter at the same time."

I said, "Do you think it is all right?"

He said, "Yes."

Ishāq said, "As he said."

§252 I said, "Sufyān said, 'If a man divorces his wife triply and then another man marries her without a *wali* and then divorces her, I do not like her first husband to remarry her until [after] an [intervening] marriage [has been concluded] with a *wali*.'"

Ahmad said, "What he said is excellent."

Ishāq said, "If he marries her without a *wali* and then divorces her, the divorce has no legal effect (*lam yaqā' salayhā*) because the marriage contract was invalid (*munfasikha*) in accordance with the Prophet's saying, 'Her marriage is void (*bātil*).'"

§253 I said, "Sufyān was asked about a man who marries a woman because he wants to make her lawful again for her first husband and then decides he wants to hold on to her. He said, 'I do not like that practice, and he should separate from her and conclude a new marriage contract.'"

Ahmad said, "This is correct."

Ishāq said, "It is not lawful for such a man to stay married in this situation, because the *muhallil* cannot lawfully conclude a valid marriage."

I said, "Sufyān was asked whether if a *muhallil* separates from his wife she can lawfully be married to her first husband, and he said no."

Ahmad said, "This is correct."

Ishāq said, "As he said."⁴⁸

§254 I said, "Sufyān said, 'When a man divorces his slave wife twice and then another man has intercourse with her, it is not lawful for the first man to remarry her.'"

Ahmad said, "That is correct and that will also be the case if he divorces her twice and then buys her. But if he manumits her, then he may marry her on the basis of a marriage that has two divorces behind it and one potential divorce remaining, in accordance with the *hadith* of 'Amr b. Mughith."

Ishāq said, "As he said."

§255 I said, "Sufyān said that if a man says to his wife, 'Every

⁴⁸ *Tahlll* (making lawful) involves a marriage concluded with a *muhallil* (someone who makes lawful) on the assumption that the marriage will be dissolved immediately after intercourse has taken place. This is a *hila* which Ibn Hanbal and Ibn Rāhwayh disapprove of. For this particular *hila*, see Schacht, *Introduction*, pp. 81–82.

woman whom I marry, as long as she lives, is divorced,' he has specified a time limit."

Ahmad said, "If such a man does marry, I do not order him to separate from his wife."

Ishāq said, "The marriage is valid, for divorce never occurs as long as he has not named a specific woman, regardless of whether he has specified a time limit. But when he does name a specific woman, he violates his oath; but if he does so, I [still] do not order him to separate from his wife."

I said, "He [Sufyān] said that when such a man says, 'Every woman I marry who is a member of the human race is divorced,' but he does not specify a time, he may marry [without being ordered to separate from his wife]."

Ahmad said, "Yes."

Ishāq said, "As he said."

I said, "Who said that when a man starts [to make a] divorce [statement], it takes place even though he does not violate an oath (*barra*)?"

Ahmad said, "This is something Shuraih said, but it is of no legal consequence."

Ishāq said, "He is correct and knowledgeable."

§256 I said, "Sufyān said [that if] a man says to his wife, 'Do not go out!' and she says, 'By God, I will certainly go out,' and he says, 'If you do go out, you are divorced,' and repeats this statement three times, the legal effect of his repetition is that a triple divorce is in effect."

Ahmad said, "If the man intended his first statement only, a triple divorce is not in effect."

Ishāq said, "As Ahmad said, only a single divorce is in effect, because the man simply repeated his original statement [for emphasis]."

§257 I said, "He [Sufyān] said [that if] a man says to his wife, 'If I do not do a certain thing, then you are divorced,' and then he or his wife dies, they both inherit from each other, if he has not specified a time limit."

Ahmad said, "When [the man in question said this] concerning a simple matter which he resolves on doing that day, but delays intentionally so that he violates his oath, then if he has divorced his wife triply, they do not inherit from each other. But when he [allows himself] with regard to his action some respite or period of delay, but he means to do it, or he promises to, then if either of them dies, they do inherit from each other."

Ishāq said, "As he said."

I said, "Someone said to Sufyān, 'Can such a man have intercourse with his wife as long as he has not violated his oath?' He said, 'Yes, because she is still his wife.'"

Ishāq said, "Whenever a man takes this kind of oath (i.e., divorce conditional on an absence of action), it is permissible for him [to have intercourse with his wife] until it becomes clear that he is violating it."

I said, "Sufyān said that when the man specifies a time limit which expires while they are both still alive, divorce takes place."

Aḥmad said, "This is sound."

Ishāq said, "As he said."

I said, "He [Sufyān] said that if a man swears by his wife, saying, 'If I do a certain thing, she is divorced,' then he divorces her triply before he does that particular thing, and then another man marries and divorces her, and then she returns to her first husband, the first husband's oath has ceased to have any legal validity (*laisa bishai*), for the possibility of violating his oath was canceled when he divorced her and another man married her."

Aḥmad said, "No, this is not the case; the potential for violating his oath remains in effect (*al-hinth 'alaithi*)."

Ishāq said, "What Aḥmad says is sound. I fear that he (i.e., Sufyān) was forgetful. Abū 'Ubaid held that doctrine."

I said, "Sufyān said that if the divorce is nonfinal, then the potential for violating his oath remains, but if he designated it as a triple divorce, then the potential for violating his oath has been destroyed."

Aḥmad said, "A triple or single divorce are the same. [The potential for] violating his oath ceases only if he [in fact] violates it. As long as he has not violated it, the legal consequences of his doing so remain potentially in effect."

Ishāq said, "As he said."⁴⁹

§258 I said, "Sufyān said in the case of a man who divorces his wife singly and then, without moving from the place he was in [when he pronounced the divorce], he says, 'If I return to you, you are triply divorced,' that if he returns to her during her *'idda*, he is as he said (i.e., triply divorced from her), but if he leaves her until her *'idda* has ended, then he may seek her hand in marriage the way any other suitor might, and he may marry her if he wishes."

Aḥmad said, "If he said this (i.e., 'If I return to you, you are triply divorced') wanting to strengthen his oath against her and [show that he did not want] to return to her, then whenever he returns to her, be it during or after her *'idda*, she is [triply] divorced. But if he wanted instead to indicate [the consequences of] his returning to her as long as she was waiting her *'idda*, then it is in accordance with his intention—he would violate his oath if he returned to her during her *'idda*, but not if he did so once her *'idda* was over."

Ishāq said, "As he said, but after the *'idda* is over, one does not speak of a return but of a new marriage contract. Otherwise, it is in accordance with the husband's intention."

§259 I said, "Sufyān said that Ibrāhīm said if a man swears he will not wear any clothing spun by his wife and then she weaves a garment, sells it and buys another, that he finds this reprehensible."

Aḥmad said, "It is reprehensible."

Ishāq said, "Ibrāhīm was correct, because it is against the man's wishes."

§260 I said, "Sufyān was asked about a man who marries a woman who gives birth five months later and then brings proof that he married her six months before. He said that kinship to the child was legally binding for the man because of the proof she had brought."

Aḥmad said, "When she establishes proof, then the child is his. When he says the child is not his, he must institute *li'ān* proceedings against his wife."

Ishāq said, "As Aḥmad said."

§261 I said, "Sufyān said that if a female slave whose husband is free gives birth and the husband denies the paternity of the child, the paternity of the child adheres to him, and there is no *ḥadd* punishment."

Aḥmad said, "No, rather he institutes *li'ān* proceedings against her and denies the paternity of the child."

Ishāq said, "It is as he said, because *li'ān* procedures can take place between any two spouses."

I said, "Sufyān said, 'When a free woman is married to a slave and then gives birth and her slave husband denies paternity, responsibility for the child adheres to him and he receives a *ḥadd* punishment.'"⁵⁰

Aḥmad said, "He can institute *li'ān* proceedings [against her]."

Ishāq said, "As Aḥmad said."

⁴⁹See above, ch. 2, for discussion of whether the consequences of an oath of *zihār* are permanent or end when the marriage in which it was sworn ends.

⁵⁰If he is unwilling to institute *li'ān* proceedings, he has slandered his wife.

- §262 I said, "Sufyān was asked about a man who slanders his deaf and dumb wife. He said, 'Al-Sha'bi would have had him flogged; others have said he should not be.'"
- Aḥmad said, "I do not think there are any legal consequences [if a man does this]. Possibly she would affirm it, or deny it, or be silent about it."
- Ishāq said, "As he said."
- §263 I said, "Sufyān was asked about a man who has intercourse with his female slave, then she gives birth and he neither claims nor denies paternity. [He said] that the only solution he saw in this case was that the paternity of the child adhere to him."
- Aḥmad said, "If it is known that he had intercourse with her, then paternity of the child adheres to him, as 'Umar said."
- §264 I said, "Sufyān was asked about a man who says to his wife, 'What is in your abdomen is not from me.' [He said] that he waits until her delivery."
- Aḥmad said, "Yes. When she delivers, if he denies paternity, then he [must] initiate *li'ān* proceedings against her. But if he claims the child, it is his, and he does not receive a *hadd* punishment (i.e., for *qadhīf*), unless he accuses her of adultery. If he does, then he is flogged [and her oath, rather than his, is accepted] [in accordance with] the *hadd* punishment."
- Ishāq said, "As he said."
- §265 I said, "Ibrāhīm and 'Aṭā' said that when a man has been flogged for slander and then slanders his wife [again], he is flogged, but his statement does not constitute *li'ān* proceedings against her."
- Aḥmad said, "Why not?"
- I said, "Because he has ceased to be a reliable witness."
- Aḥmad said, "What has witnessing to do with *li'ān*?"
- I said, "Then [his statement] does constitute *li'ān* proceedings?"
- Aḥmad said, "Yes, by God. If the meaning of *li'ān* were the same as the meaning of witnessing, then a man who is *fāsiq* and who slanders his wife would not be able to institute *li'ān* proceedings against her. Further, if the meaning of *li'ān* were the same as that of witnessing, then he could witness, or she could, or someone else could witness against both of them."
- Ishāq said, "As he said."
- §266 I said, "Sufyān was asked about a man who sees a child at his wife's breast and says, 'This is not my child, but I am not hereby slandering my wife.' He said that the wife can bring proof that

- it is her child; if she does not, the husband does not receive [the *hadd* punishment for *qadhīf*]."
- Aḥmad said, "When the bed is the husband's bed and he says, 'This child is not mine,' and she has given birth to the child while in his control, then he should institute *li'ān* proceedings."
- Ishāq said, "It is as he said."
- §267 I said, "What if a man says to his wife while she has a child with her, 'This child is not yours?'"
- Aḥmad said, "Such a statement means nothing."
- Ishāq said, "As he said."
- §268 I said, "Al-Sha'bi said that if a man slanders his wife and accuses her of adultery by saying, 'Fulān committed adultery with you,' then she participates in *li'ān* proceedings against him; then the man with whom the husband slandered his wife comes along later and says, 'You lied about me,' she is not flogged because of the [accusation of her] husband. Further, since she has participated in the *li'ān* proceedings against her husband, the accused man's [potential] *hadd* punishment is [thereby] canceled."
- Aḥmad said, "The *ḥadīth* of Mā'iz b. Mālik when the Prophet said to him, 'With whom?' and he answered, 'With *fulāna*,' but he did not flog him."
- Ishāq said, "As he said."⁵¹
- §269 I said, "Sufyān said, 'When a man specifies a time limit in a declaration of *zihār* and the time limit expires, there are no legal consequences.'"
- Aḥmad said, "When the time has passed, the *zihār* lapses."
- Ishāq said, "As he said."
- §270 I said, "[Sufyān] said, 'A man who is expiating his oath of *zihār* by means of fasting and then has intercourse with his wife at night must start fasting over again.'"
- Aḥmad said, "He starts over again."
- Ishāq said, "As he said."
- I said, "If he is feeding [sixty poor people to expiate his oath of *zihār*] and has intercourse, [then] he continues to give out food; this is not the same as fasting."
- Aḥmad said, "He continues to give out food."

⁵¹ Mā'iz b. Mālik came to the Prophet and confessed to adultery. The Prophet did not order a *hadd* punishment for him until Mā'iz had confessed four times. There are many traditions about Mā'iz, with varying detail. See, for example, Ibn Hanbal, *Musnad*, 8:217, 347. See also, Burton, *Sources*, pp. 142–150, for the story of Mā'iz in the framework of a discussion of the sources for the establishment of the punishments for illicit sexual intercourse.

Ishāq said, "As he said."

- §271 I said, "Sufyān said, 'When a man says to his wife, "You are to me like the back of my mother if I approach you," if he approaches his wife before four months are over, the situation is like [one of] *ḡhār* and [the possibility of] *ilā'* lapses. But if he leaves her four months without having intercourse with her, then [the situation is one of] *ilā'* because what he said prevented him from intercourse. Then, whenever he approaches her after that, he must deal with the legal consequences of *ḡhār*. [This is the case] as long as he has not specified a time limit. But if he has, and that time limit expires before he has intercourse with his wife, his *ḡhār* lapses.'"

Ahmad said, "If he says, 'You are to me like the back of my mother,' and he does not specify a time limit, he must expiate his oath of *ḡhār*, unless he divorces his wife triply. If he does so, then he need not expiate his oath of *ḡhār*, unless he wishes to remarry the same woman after [she has been married to] another husband. In this case, expiation of the oath of *ḡhār* will be incumbent upon him.

"Further, if he says to his wife, 'You are to me like the back of my mother for a year if I have intercourse with you,' if she, after four months have passed, comes forward [and brings the matter to the attention of the judge], the marriage is suspended on her behalf, and at that point, the husband in question must either have intercourse with his wife or divorce her. However, if the wife lets the whole thing go until a year has passed, then his *ḡhār* lapses. But if he is going to have intercourse with her before the year is up, he must expiate his oath of *ḡhār*."

Ishāq said, "As he said."

- §272 I said, "Sufyān said, 'We do not know of the oath of *ilā'* being applicable to anything other than intercourse, and the husband is the one who takes the oath of *ilā'*.'"

Ahmad said, "That is correct."

Ishāq said, "As he said."

- §273 I said, "Sufyān said about a man who takes an oath of *ilā'* that if, after four months are up, he says that he had intercourse with his wife before they were up, he is not believed unless he brings proof, because she has already separated from him. But if he says he has had intercourse with her before the four months are up, then he is believed."

Ahmad said, "Either before or after four months have passed, he is believed, for he may have intercourse with her after four months if he wishes."

Ishāq said, "As he said."

- §274 I said, "Sufyān said concerning a man who takes an oath of *ilā'* while ill, then recovers after four months have passed, then dies during his wife's *idda* that she inherits from him."

Ahmad said, "Nothing happens after four months have passed."

Ishāq said, "It is as he said because the passage of four months does not constitute a divorce as some people (*hā'ulā'i*) say [it does], just because a marriage can be suspended after four months."

I said, "He [Sufyān] said, 'When a man swears an oath of *ilā'* while healthy and after four months pass he becomes ill and then dies during his wife's *idda*, mutual rights of inheritance do not prevail between the couple.'"

Ahmad said, "This is just like the previous question. Nothing happens. His wife remains in her position as his wife."

Ishāq said, "As he said."⁵²

I said, "Sufyān said, 'When a man swears not to have intercourse with his wife in a house, a dwelling, or a place of residence (*bait, dar, manzil*), then does not come near her for four months, this is not a case of *ilā'*, because if he wishes, he can have intercourse with her somewhere else, with no consequences.'"

Ahmad said, "He is correct."

Ishāq said, "This is *ilā'* because he takes an oath not to have intercourse."

I said, "I asked Sufyān about a man who swears not to have intercourse with his wife [and says] 'in *shā' Allāh*.' [He said,] 'They say such an oath has no legal consequences, until he swears to give purpose to an oath not to have intercourse for four months or more.'"

Ahmad said, "I do not accept *istithnā'* in divorce. However, in this case there is no divorce included in *ilā'* itself. I do not make divorce a necessary component of oaths of *ilā'*, and therefore *istithnā'* is permitted in them."

Ishāq said, "*Istithnā'* is permitted."

- §275 I said, "Sufyān spoke about the case of a man who is absent from his wife, and she receives news of his death, news that he has been killed, so she waits an *idda* of four months and ten days and subsequently remarries. Then her first husband comes forward and says that she is his wife. Someone said to him (i.e., Sufyān), 'Has he (i.e., the first husband) [thereby] slandered his

⁵² Both Ibn Hanbal and Ibn Rāhwayh hold here to the principle that an oath of *ilā'* in itself does not affect the legal status of a marriage.

wife (*qadhafahā*)? He (i.e., Sufyān) said, 'No, he can institute *li'ān* proceedings against her and then she and her second husband are separated. Then she waits an 'idda [as a result of the *li'ān* proceedings], and then, if he wishes, the second husband can remarry her.'

Ahmad said, "It is as he said, but this is not an instance of a man being *mafqud*. One does not hear news of the death of the *mafqud*. If news of a man's death is announced, then this is a clear matter."

Ishāq said, "It is exactly as he said, except the *mafqud* is not like the one who is absent. Rather, the *mafqud* is someone who is missing from a place and it is not known where he has gone. Often, one hears news of his death, as well as of the death of the absent person."

§276 I said, "Can a woman borrow against her husband's assets while he is absent?"

Ahmad said, "If she does not do so, she should be compensated out of his assets."

Ishāq said, "Just as he said."

§277 I said to Sufyān, "What if a woman passes by a man, and he swears by God that he will not have intercourse with her, then he marries her and does not come near her for four months?"

He said, "They say such an oath has no legal consequences while he has no wife."

Ahmad said, "The oath has no legal consequences."

Ishāq said, "It is as he said, because a man can take an oath of *ilā* only with regard to a woman actually in his possession, because He said, *Those who forswear their wives* (2:226).

§278 I said, "I asked Sufyān about a man who swears that he will not have intercourse with his wife for four months; then after two months he divorces her with a single definite divorce, then he remarries her. Sufyān said that the four months start all over again, and the previous two months are not taken into account."

Ahmad said, "There must be four consecutive months; the two months that were completed previously do not count."

Ishāq said, "Just as he said."

§279 I said, "Sufyān said that if a Christian swears an oath of *ilā* regarding his wife, and then four months pass, after which both he and his wife become Muslims, he must divorce his wife definitely."

Ahmad said, "If the Christian becomes a Muslim, his mar-

riage is suspended after four months, like the marriage of any Muslim."

Ishāq said, "Just as Ahmad said."

§280 I said, "Sufyān said, 'When a woman parts from her husband by means of *khul'* while she is terminally ill, if the *khul'* has been arranged for less than his legal inheritance from her, that is valid; but if it has been arranged for more than his legal inheritance from her, that is not valid.'"

Ahmad said, "That is correct."

Ishāq said, "As he said."

I said, "Sufyān said, 'When a husband acknowledges that he is in debt to his wife during his terminal illness and he has separated from her during this illness, if the debt he acknowledges is less than, or exactly the same as, her inheritance, we grant it to her, but if it was more we do not.'"

Ahmad said, "This is sound."

Ishāq said, "His acknowledging a debt to her during a terminal illness is valid, even though she is not his wife because he has separated from her, unless it is known that he wants [thereby] to hang on to the [value of the] debt, and that is the case with every heir."

§281 I said to Ahmad, "Sufyān said, 'When a woman says, during her husband's terminal illness, that he has not divorced her, he is asked for proof that he has divorced her, and if he cannot produce it, then she inherits from him.'"

Ahmad said, "She inherits from him until he proves that he divorced her."

Ishāq said, "As he said."

§282 I said, "Sufyān was asked about a man who leads a group in prayer and in the group is a certain man (*fulān*) to whom he has sworn not to speak. Then he pronounces [one of] the salutation[s] of prayer and intends to salute that certain man. Sufyān said, 'I think the man has violated his oath, unless he gave the salutation without intending that certain man.'"

Ahmad said, "This is sound."

Ishāq said, "Whenever he (i.e., the man acting as *imām*) salutes the congregation, he does not thereby intentionally direct his speech [to anyone in particular]. [and therefore] he has not violated his oath. For he violates his oath by his intending to do so, and he did not intend the salutation of prayer, when he [initially] swore his oath."

§283 I said, "Sufyān said that in the case of a Christian who divorces

his wife triply, if his wife can prove that he has done so, the governor (*walī*) separates the couple."

Ahmad said, "If they refer such a question to us, we judge in accordance with the legal precepts of Islam."

Ishāq said, "As he said."

§284 I said, "What if a man to whom no children have been born gets married?"

Ahmad said, "If he knows that the problem is his, I prefer he make this clear, lest the woman wish to have children."

Ishāq said, "It is as he said, because he is not permitted to deceive her."

§285 I said, "Sufyān said, 'If some people say to a certain man that if he produces a dower they will give him in marriage to a certain woman, and if he does not, there remains no obligation between him and them, that such a marriage is valid, if it takes place, and the condition is void (*bāṭil*).'"

Ahmad said, "Both the condition and the marriage are valid."

Ishāq said, "It is as he said, because the Prophet said, 'The best of conditions are those which fulfill the prerequisites for women being lawful to you.'"

§286 I said, "Sufyān was asked about a man who marries a woman, including in the contract a binding condition that he will not expel his wife from her house and that if he does, her matter is in her hands. Sufyān said that the condition was valid but that it was reprehensible."

Ahmad said, "The condition is binding and it is not reprehensible."

Ishāq said, "Just as Ahmad said."

§287 I said, "Sufyān said if a man who has four wives marries a fifth wife who bears him children, the marriage with the fifth wife is invalid, the couple are separated, she receives a dower as compensation for intercourse, and the man is legally responsible for the offspring [of this fifth marriage]."

Ahmad said, "That is correct if both of them are unaware of what they have done; but if they did it intentionally and they are both *thayyib*, they are stoned and the husband is not legally responsible for the offspring, for no one is who has received a *ḥadd* punishment; anyone from whom a *ḥadd* punishment has been averted, I do make legally responsible for the offspring."

Ishāq said, "It is as he said and as he has understood the question."

§288 I said, "What about a man who swears that he does not know whether he has or has not divorced a certain woman?"

Ahmad said, "He is not held responsible for divorce until he knows about it or becomes certain of it."

Ishāq said, "As he said."

§289 I said, "What about a man being married to two paternal cousins at the same time?"

Ahmad said, "Some scholars used to find that reprehensible."

Ishāq said, "That was because of the immorality of the relationship, but in fact it is lawful."

§290 I said, "What about a slave's fasting to expiate an oath of *zihār*?"

Ahmad said, "He fasts for two months."

Ishāq said, "As he said."

§291 I said, "What about a person holding that *faḍ* means *jimāʿ*, but if a man is ill, he can express his intention to have sexual intercourse?"

Ahmad said, "Whoever holds this position is correct."

Ishāq said, "*Faḍ* does not mean anything except *jimāʿ*, unless a man is ill and not at all able to complete sexual intercourse."⁸³

§292 I said, "Can a slave take a concubine?"

Ahmad said, "Yes, with the permission of his master."

Ishāq said, "As he said."

§293 I said, "What happens when a slave who has a wife runs away?"

Ahmad said, "She remains his wife."

Ishāq said, "As he said."

[I said,] "Ahmad was asked about a man who gives a female slave of his as a concubine to a male slave of his, and then the male slave runs away. He said that the man then takes back his female slave, and he may [once again] dispose of her as he wishes."

Ishāq said, "As he said."

§294 [I said,] "Ahmad was asked about a man who gives a female slave of his in marriage to a male slave and then the male slave runs away. He did not think this situation required a *fatwā*."

Ishāq said, "Whenever a marriage has been concluded for a slave, his running away does not result in a divorce."

§295 I said, "What did 'Ali mean when he said to a woman who came to him, 'Have faith in God and wait in your house'?"

Ahmad said, "He was referring to the impotent husband who

⁸³ Both these words mean sexual intercourse. A man who wishes to return to his wife after divorce or end a period of *ilāʿ* need not complete the sexual act if, for example, he is ill, or in a state of *ihṛām*, as long as he has expressed his intention to do so.

has never had intercourse with his wife. However, when a man has had intercourse with his wife once, he is not impotent."

I said, "Does one wait a year after a marriage before a man is considered impotent?"

Ahmad said, "Yes."

Ishāq said, "As he said."

§296 I said, "What happens when a woman apostatizes? Is she separated from her husband?"

Ahmad said, "No, he is forbidden to touch her. Then when her *ʿidda* is over, she is separated from him. But if she or he repents during her *ʿidda*, they remain married as they were—that is, if either the husband or the wife has apostatized."

Ishāq said, "As he said, because that is the *sunna* concerning this question of apostasy. Those who gave a ruling on the apostate and considered apostasy a single divorce were ignorant; they adduced as proof His saying, *And hold not to the ties of disbelieving women* (60:10), but they were mistaken, for he has not divorced his wife by means of her apostasy; rather she has become separated from him."

§297 I said, "What if a Christian woman accepts Islam while she is married to a Christian man?"

Ahmad said, "The couple are separated."

I said, "What happens when her husband converts to Islam while she is waiting her *ʿidda*?"

He said, "Then he has the right to her."

Ishāq said, "Yes."

§298 I said, "Does the female slave veil herself?"

Ahmad said, "No."

Ishāq said, "As he said."

§299 I said, "When a Muslim is taken prisoner and thus converts to Christianity, is his wife separated from him?"

Ahmad said, "When her *ʿidda* is over, she is separated from him, but if he returns to her during her *ʿidda*, he has the right to her."

Ishāq said, "As he said."

§300 Ahmad said, "A man may choose divorce in the case of *ilāʾ*."

I said, "How many divorces result from divorce after *ilāʾ*?"

Ahmad said, "A single one."

Ishāq said, "As he said. The wife is separated from her husband on the basis of a single divorce when her *ʿidda* has ended."

§301 Ahmad said, "If a man declares that his wife is *ḥarām* to him, he must undertake the expiation for *ẓihār*. The effect is the same

whether he says, 'You are to me like the back of my mother' or 'You are forbidden to me.'"

Ishāq said, "As for a *ḥarām* statement, it is judged in accordance with the husband's intention with regard to divorcing his wife. If he did not intend to divorce her, then he must expiate his oath."

§302 I said, "*Khulʿ* is a divorce, but what if either of them has second thoughts?"

Ahmad said, "*Khulʿ* is a complete separation in accordance with the doctrine of Ibn ʿAbbās. If the couple wish to return to each other, their [new] marriage has three divorces behind it."³⁴

Ishāq said, "As he said."

§303 I said, "He said, I heard Sufyān say, 'When a man marries while he is in a state of *ihṛām*, or his wife is menstruating, or it is Ramadan, and she claims that they have had intercourse, she has made it incumbent upon him to give her a dower.'"

Ahmad said, "If the door has been locked and the curtain drawn."

Ishāq said, "The matter is as we have previously described it."

§304 I said [to Ishāq], "Is selling a slave tantamount to divorcing her? Sufyān said, 'I adduce as proof the *ḥadīth* of Ibn Masʿūd and Anas that they interpreted His saying *And all married women (are forbidden unto you) save those (captives) whom your right hand possesses* (4:25). For Ibn Masʿūd said this verse was revealed concerning both unbelievers and Muslims. But Abū Saʿīd said it was revealed concerning the women captured at Autās, who had husbands belonging to their own clans, and "*married women*" refers to these women. 'Alī said, agreeing with Abū Saʿīd that it was revealed concerning unbelievers. As for the interpretation of [this verse] by those who interpret it with regard to Barīra—she was given the option of separating from her husband after ʿĀʾisha bought her and manumitted her; that is, buying her did not constitute a divorce. Then, there is no indication that her sale was not her divorce, because it is not known whether it took place before or after the *āya* was revealed. Ibn ʿAbbās transmits the story of Barīra: [he relates] that the Prophet gave her the option of separating from her husband. And Ibn ʿAbbās says that a female slave's sale is her divorce.' [I said.] But Ahmad preferred the *ḥadīth* of Abū Saʿīd al-Khudrī."

Ishāq said, "As he said. Sale of a female slave never automati-

³⁴ That is, the couple can remarry only if a new marriage contract is concluded.

cally results in her being divorced, until her husband divorces her or her body is bought from the husband."

I said, "Then what about someone who buys a married female slave?"

Aḥmad said, "Her sale is not her divorce."

Ishāq said, "As he said."

§305 I said, "Al-Auzā'ī was asked about a man who says, 'Every female slave I buy is free.' Al-Auzā'ī was asked when she became free. He replied that if a man has intercourse with a female slave of his and does not withdraw from her before completion of the sexual act, then he has taken her as a concubine."

Aḥmad said, "I do not go as far as to make him manumit her, but if he does there is no harm in it. That is, I do not make him manumit her unless they are all in his possession already and he says, 'When I take one of you as a concubine, she is free.' Further, if it becomes necessary for her to perform an ablution [after having had intercourse], then he must be considered as having taken her as a concubine."

Ishāq said, "It is as he said, and this is not a matter of base behavior."

§306 [I said,] "Al-Auzā'ī was asked about two youths, one of whom practices sodomy with the other. He was asked whether after they have matured and the passive youth fathers a daughter, the sodomite may marry her. He said no."

Aḥmad said, "Our doctrine is the same as al-Auzā'ī's if there has been anal intercourse."

I said, "Must both participants in an act of sodomy perform ablutions [as is the rule after intercourse]?"

Aḥmad said, "If there has been anal intercourse they must, because the legal consequences for them are those of having committed fornication. The same is true of a man who has had intercourse with an animal. He must perform an ablution, even if he has not ejaculated."

Ishāq said, "It is as he said."

§307 Ishāq was asked about a man who divorces his wife singly and whose wife then remarries during her *'idda* and her *'idda* ends while she is married to her second husband.

Ishāq said, "The *sunna* in this case is that the wife is separated from the husband she married during her *'idda* from her first husband. Then she waits an *'idda* for her divorce from her first husband, and, if the second one has not had intercourse with her, he may marry her as soon as her *'idda* ends. However, if the

second husband has had intercourse with her, the couple are separated, he owes her a dower on the basis of having had intercourse with her, and she completes an *'idda* from him after she has completed her *'idda* from her first husband. Two *'iddas* are required from her, if the second husband has had intercourse with her."

§308 Ishāq was asked what happened when a female slave who is married to either a free man or a slave is manumitted.

He replied, "The *sunna* in this case is that she has no option at all of separating from her husband if he is a free man, because through manumission she has achieved the same status as he, so what is there to choose? Rather, she can opt to separate from her husband when she is manumitted if he is a slave. Further, the truth of the matter about Barīra's husband is that he was a slave."

§309 Ishāq was asked about a man married to a woman with whom he has not had intercourse. "Is it incumbent upon him to provide maintenance for her if she is too young for intercourse?"

He replied, "As long as she is old enough for intercourse and her family has not refused to deliver her to him, then he must provide maintenance for her. However, if she is too young for intercourse, he need not, until she reaches the appropriate age for it."

§310 Ishāq was asked about a free man married to a slave. "If he divorces her doubly, and then, during her *'idda*, she learns that she has been manumitted, how should the *'idda* be handled?"

He said, "The length of the *'idda* is in accordance with the status of the woman waiting it. When her husband divorces her doubly, her *'idda* is that of a free woman. He, if he wishes to separate from her finally, must divorce her triply, because divorce is in accordance with the status of men. Thus when he divorced her twice, there remained one more divorce. Then he informed her of her manumission, but she was not irrevocably divorced from him."

§311 Ishāq was asked about a slave man married to a free woman. "What if he divorces her doubly, then learns during her *'idda* that he has been manumitted. Can he return to her?"

He said, "Absolutely not. He has divorced her finally, for divorce is in accordance with the status of men, and her *'idda* is that of a free woman."

§312 Ishāq was asked about the *'idda* of the *umm al-walad* when her master dies.

He said, "The *sunna* as far as we are concerned is that she waits an *idda* of four months and ten days."

- §313 Ishāq was asked about the least amount of time in which a woman's claim that her *idda* has ended should be accepted.

He said, "When a woman's menstrual cycle is well known before she begins her *idda*, that is, if it is known by her closest female relatives who are pious and faithful, then she is believed about the end of her *idda*, even if the period of time is forty days. But if her cycle is not well known and this is the beginning of her menstrual cycle, even if three menstrual periods have taken place in a month, then her *idda* is not over and she is not believed in under three months, because caution is always best regarding the length of an *idda*. Further, Allāh substituted the period of a month instead of a complete menstrual cycle for women who are past the age for menstruating, or for those who have stopped menstruating for any other reason. If a Muslim has any doubt about the end of a woman's *idda*, he should refer the question to the Qurʾān and the *sunna*."

- §314 Ishāq was asked about a man who marries a woman and has intercourse with her. [He was asked] to whom the child belongs if the woman gives birth within six months.

He said, "The child is the husband's, because women do give birth in six months, unless the wife has previously been married to a man who separated from her when she was pregnant, or who died, leaving her a pregnant widow. In either of these cases, the [second] husband cannot claim the child, if it is known that his wife was pregnant by her previous husband. However, if this is not known, the [second] husband can claim the child. If both the former and the current husband claim the child, it belongs to the current husband, because women do give birth in six months [after conception]."

- §315 Ishāq was asked [about a man who puts a woman's matter into her hands], and he said, "[The question of what happens] whenever a man puts a woman's matter into her hands [is one] about which the Companions of the Prophet disagreed. ʿUthmān and Ibn ʿUmar were of the opinion that it meant what the wife decided it meant (*al-qadāʾ mā qadat*). But ʿUmar and Ibn Masʿūd said [that the statement] 'Your matter is in your hands' is like a man's saying [to his wife], 'Choose!' and they deemed that (i.e., the statement 'Choose!') a single, revocable divorce. But another Companion of the Prophet disagreed with them and said that [how many divorces the statement implied] was up to the man.

"What we use as a basis [for deciding the question] is having the judge (*qāḍī*) make the man [who says to his wife, 'Your matter is in your hands'] take an oath about what he means. Then, if he means a single revocable divorce, his statement can result in one, and if he means an irrevocable divorce, or more than one divorce, his statement is [understood] in accordance with what he means.

"It has been explained that where Ibn ʿUmar said that it (i.e., the statement 'Your matter is in your hands') meant what the wife decided it meant, he [also] said, 'Unless the husband intended something else. In that case, the judge (*qāḍī*) makes the husband take an oath [regarding his intention], and then he abides by it.' This doctrine most resembles the past *sunna* (*al-sunna al-māḍiya*).

"Because the Prophet gave his wives the choice, ʿUmar held that whoever gave [his wife or wives] the choice was not innovating, and whenever a man can lawfully divorce his wife on the basis of a doctrine that has been established for him as *sunna*, that divorce takes place only in accordance with the *sunna* of that doctrine, and it (i.e., a statement of *takhyir*) becomes a [single] revocable divorce.

"What strengthens this doctrine (i.e., that of inquiring of a man what his statement 'Your matter is in your hands' means) is the Prophet's saying to Rukāna b. ʿAbd Yazīd when he divorced his wife *al-batta*, 'What do you mean by that?' And that is what ʿUmar did; he made any man who divorced [his wife using the expression] *al-batta*, or an expression similar to *al-batta*, take an oath, and thus the legal consequences of his statement are in accordance with what he stipulated.

"Thus, in cases where [a man says to his wife], 'Your matter is in your hands,' we choose to have the man take an oath as to what he meant by his statement—whether he meant three [divorces], or fewer. Whenever a man [in the process] of divorcing is made to take an oath, he gives his word about what he claims [he meant]."

- §316 Ishāq was asked [about divorce pronounced before marriage, and he replied], "As for the man who swears that every woman he marries is divorced, or [that] a woman whom he has named [is divorced if he marries her], the *sunna* has been established (*al-sunna qad maḍat*) that there is no divorce before marriage. Thus whenever a man [swears that every woman he marries is divorced but] does not name a particular woman, nothing will

happen (i.e., no divorce will occur if he marries). Further, if he names a woman's tribe, or her city, or if he says, 'If I marry a certain woman (*fulāna*) in addition to my wife,' or something resembling that [statement]—for example [mentioning] definite time limits—then divorce [still] will not occur. We do not know of an established *sunna* on this matter corroborating [what we have just said]. Rather, we came [to a decision] about a specifically designated woman (*al-mansūba*), after the Prophet's *ḥadīth* came requiring further explanation (*mujmalan*). Thus if the Prophet meant [only] a woman who was not specifically designated (*ghayru'l-mansūba*), we have made valid (*ʿajaznā*) [marriage with] one specifically designated; but if he meant [marriage would be valid both with] a woman specifically designated and with one not specifically designated, then we have [also] followed (*ittabaʿnā*) [the Prophet's *sunna*]."

§317 Ishāq said, "As for the man who wants to divorce his wife triply, or less, or more, and has set his heart on that, then says, '*fulāna bi. fulāna* (i.e., her name),' but does not say 'is divorced,' if his wish and his intention to mention triple [divorce] was [that it result in] his being divorced, he is [in fact] divorced, even if his statement bore no resemblance to a divorce [statement]."

"The scholars (*ahl al-ʿilm*) have agreed that whatever bears a resemblance to a divorce creates a divorce, such as what preceded his intention—his wish to divorce; then, his saying her name and [the word] 'triple' would be an indication of his intention. But if he, when he has said her name and mentioned [the word] 'triple,' thereupon dislikes [the idea of] pronouncing a divorce, his previous intention is negated.

"If it turns out that his wife did not hear of his doing this (i.e., virtually declaring her divorced), then it is permissible for him not to inform her of that, and similarly [she need not be informed] if someone else heard the husband's statement, or the husband told him of it, but he did not actually utter the divorce out loud.

"But if someone informs his wife of that (i.e., that her husband has virtually declared her divorced), she is obligated to bring her husband before a judge (*qāḍī*), so that he can be made to take an oath regarding his intention. Then it is up to the judge to make him take an oath whenever he has mentioned the word 'triple.'

"Even though there exists [in support of] what we have said only what Laith b. Abī Sulaim mentioned in an isolated tradition

(*bi-khabar wāḥid*) on the authority of al-Hakam b. ʿUtaiba—that a man wanted to divorce his wife triply, but when he wanted to utter that [divorce out loud], another man put [a hand] on his mouth and held back [the word] 'triple'—the scholars (*ahl al-ʿilm*) have agreed that this [counts as] a triple [divorce].

"Thus, the best doctrine we can establish is that of those whom we have described—those who deemed it triple [divorce], once the husband clearly made a gesture indicating his wish."

§318 Ishāq said, "As for a father who betroths his daughter to a man and then gives her in marriage to him with one woman as a witness, if the husband is then absent from the daughter for a year, and the father gives his daughter in marriage, against her will, to another man who conducts her to his home in a marriage procession, while she rejects the marriage, screaming, 'My father has already married me to *fulān*,' the first contract was not valid because of the inadequacy of the witnessing to it, unless it was announced by both the father and the husband, before he went away, so that word got around, [along with the fact that] the husband did not deny it. In this case, whenever the marriage is the way we described it, in the opinion of Mālik and the people of Madina and those scholars of Iraq who followed them such as Ibn Idrīs, Yazīd b. Harūn, Ibn Mahdī, and such like, it is a valid marriage, for announcing it became witnessing it. However, the best doctrine as far as we are concerned is that two witnesses, or two women and a man be witness to the contract.

"Those whom we have described followed a [certain] doctrine, and, on the basis of it, they explained the following two marriages: 'Alī's giving Umm Kalthūm in marriage to ʿUmar and his sending her to him;⁵⁵ al-Furaʿa's being given in marriage to al-Musaiyab ibn Najba.' One [is explained] from the other, and this sort of thing is offered by way of proof, but this is not clear.⁵⁶

"As for the daughter who rejected being given in marriage to a second husband after she said, 'My father has already given me in marriage,' this second marriage was invalid, because it would have been necessary to obtain her consent. If she wishes

⁵⁵ As this marriage is described in Ibn Saʿd, 8:339–340, 'Alī concluded a marriage contract for his daughter Umm Kalthūm with ʿUmar, and then ʿUmar told the Prophet and a number of Companions. After a certain amount of time, when ʿUmar was caliph, 'Alī sent her to him.

⁵⁶ Although Ibn Rāḥwayh admits that both Madinese and Iraqi scholars accept the validity of a marriage that is widely acknowledged, he himself insists that a valid marriage must be witnessed.

to be married to the first husband, the marriage contract should be concluded again. The second one was not valid because she rejected it. This would hold true for either doctrine (i.e., whether the first marriage was or was not valid)."

- §319 Ishāq said, "As for the man who says to his wife, 'If you enter the house of so and so, then you are not among my possessions,' if he meant to divorce his wife, then it is (i.e., his divorce), in accordance with his intention, a single, double, or triple divorce [statement]. But if he were to say, 'I did not intend a divorce; rather I meant that you would not be among my possessions on the basis of what I would have done with you,' or something resembling that type of meaning, then he is made to take an oath, and whatever he avers, he is believed."

- §320 I said to Ahmad, "What about a woman whose husband dies while she is in a village about a *farsang* away?"

He said, "As a visitor?"

I said, "Yes."

He said, "She goes back to her house and waits her 'idda in it."

Ishāq said, "Just as he said."

- §321 I said, "When a man wants to manumit a female slave of his and marry her, making her manumission her dower, how does he do this?"

Ahmad said, "He says, 'I have manumitted you and made your manumission your dower.'"

Ishāq said, "This is valid. But if she dislikes [the marriage], then it is not valid; [that is], if she says, 'I do not consent.'"

- §322 Ahmad was asked about a man who manumits one of his slaves who has assets (*māl*).

He said, "His assets belong to his master. However, 'Ayyūb related on the authority of Nāfi' that Ibn 'Umar manumitted one of his slaves who had assets but did not concern himself with these assets; rather, he left them to the manumitted slave. But it is related on the authority of Ibn Mas'ūd that he said [in comparable circumstances], 'What you have belongs to me.' And [a similar statement has been related] on the authority of Anas b. Mālik."

Ishāq said, "As he said."

- §323 I said to Ahmad, "[What about the case of] a woman whose prepubescent husband dies while she is pregnant? Does she wait an 'idda of four months and ten days?"

He said, "No. She waits the term of her pregnancy, and the child is not her late husband's. If she had not been pregnant, then she would wait an 'idda of four months and ten days."

Ishāq said, "As for the 'idda, it must be four months and ten days. If she gives birth before that, the four months and ten days must be completed, because this is a pregnancy that results from adultery, and the child is not the late husband's, unless it is known that the child is his, on the basis of his having had intercourse with her, having become sexually mature. However, when he is too immature for intercourse, the child is never his. Whenever a man has intercourse with a woman and is apparently her husband, if it then turns out that she is really someone else's wife, her husband never accepts the child, regardless of whether a judge has given a ruling. For if that someone else had been absent, he would not accept paternity of the child; the child would belong to the man having intercourse with the woman and apparently married to her."

I said, "Which is the final period of waiting?"

Ahmad said, "When a woman is pregnant, and gives birth before four months and ten days have passed, then she completes the four-month-and-ten-day period. But if she remains pregnant more than four months and ten days, on the basis of the completion of her term of pregnancy I excuse her from further waiting."

Ishāq said, "As he said. We have compared the legal effect (*hukm*) of pregnancy resulting from adultery to the one that exists when a woman's husband is a prepubescent youth or absent from home. This is the doctrine, for there was not an existing *sunna* concerning it."³⁷

- §324 I asked Ahmad about a man who says to his wife, "*Bahishtam*," and intends, saying this, to lie.

He said, "This statement is at least a single divorce (i.e., if not a double or triple divorce). Don't you see that if a man says, 'You are divorced' (*anti talīq*) and means to tell a lie, that counts as a single divorce? These two cases resemble each other (*fahādā mithla dhāka*)."

Ishāq said, "Whenever a man firmly intends a divorce, or seems to, then a divorce takes place. The case is the same if he speaks in Persian."

- §325 I said to Ahmad, "When a man swears and says [to his wife], 'If I speak to you during the next five days, you will be divorced,' can he have intercourse with her without speaking to her?"

He said, "What seems clear here is that in this [case] the hus-

³⁷See Mālik, *Mudawwana*, 2:444-445, for discussion of this issue, and Ibn Qudāma, 9:119-120. A woman's delivery does not end her 'idda when her child clearly cannot be her husband's, as is the case if he is a eunuch or a minor youth.

band's intention is considered. When the husband wishes either to distress or anger his wife, [then he cannot have intercourse with her without speaking to her,] but if he has no such intention, then he can certainly have intercourse with her without speaking to her."

Ishāq said, "As he said, unless [his swearing] is a ruse (*iḥtīyāl*)."
§326 I said to Ahmad, "When a divorced woman appears to be pregnant, can her husband return to her?"

He said, "Isn't it said, 'as long as she has not given birth (i.e., and thereby ended her *'idda*)?' And he followed this doctrine: 'until she gives birth.'"

Ishāq said, "It is as he said. He can return to her, as long as she has not given birth (i.e., thereby ending her *'idda*)."

§327 Ishāq was asked about a man who behaves immorally toward his daughter-in-law or kisses her or has physical contact with her.

He said, "As long as his behavior toward her does not include sexual intercourse, then 'whatever is forbidden does not forbid whatever is lawful.'"

§328 I said to Ishāq, "A man fornicates with a woman who then nurses a certain girl. What if this man marries that girl?"

He said, "He must not marry that girl if he has touched her mother."

§329 I said to Ishāq, "What about a man who swears to divorce if he does not do a certain thing? [What if] he then forgets and does it?"

He said, "I prefer that there be no legal consequences of either divorce or manumission, if a man acts forgetfully."⁵⁸

§330 I said to Ishāq, "[What about] a man who says to his wife, 'Your matter is in your hands,' and she says, 'I divorce myself (*tallaqtu nafsī*)' or 'I divorce you (*qad tallaqtuka*)?'"

He said, "Both are the same if she meant by saying 'You are divorced (*anta ṭāliq*)' [to say] 'I am divorced (*anā ṭāliq*).'"

§331 I said to Ishāq, "[What if] a man says to his wife, 'You are forbidden to me?'"

He said, "Whenever he intends divorce by that statement, it produces a triple divorce. But if he intended, by what he said, an oath, then it is an oath."

§332 I said to Ishāq, "[What about] a man [who] swears to divorce on the basis of something not being a certain way, and then learns that [whatever it is] is not in accordance with his oath?"

He said, "Whenever a man swears to divorce on the basis of doing a certain thing, and he then ascertains later that he did not do it, he is judged the same way as he would be in an instance of forgetfulness, because he has made a mistake. In *ḥadīth*, making a mistake and forgetting are treated the same way (*qad ḍumma*)."

§333 I said to Ishāq, "What about a man who fornicates with a certain woman who then says to him, 'I nursed your wife,' and then retracts what she said? Is her statement accepted, or is it of no consequence, [especially] if two women have witnessed that she was lying the first time?"

He said, "Her retraction is accepted, even though she would be suspect as a witness. Further, when two women will say she lied, that strengthens her retraction, even if evidence would not be accepted from these two women in a judicial ruling (*fi'l-ḥukm*). If she does not retract what she said and persists in her initial statement, it is permissible (*lahu*) for the man in question to doubt her, unless what she has said is a well-known fact (*khabar mustafīd*)."⁵⁹

§334 I said to Ishāq, "What is the meaning of the statement 'The lawful is not forbidden by the forbidden?'"

He said, "As for the saying 'Whatever is forbidden does not forbid whatever is lawful,' it means that if a man fornicates with a woman with whom it is not lawful for him to have intercourse, his fornication has not made a woman with whom it is lawful for him to have intercourse, forbidden."

§335 I said to Ahmad, "[What about] a woman who becomes angry and says to one of her relatives, 'My husband has divorced me?' [What if] the husband is then asked whether he has divorced her, and he says he has when he has not, wishing thereby to anger her?"

Ahmad said, "There is disagreement on this question. I fear for him when he says, 'I have divorced you,' and he has not."

Ishāq said, "Whenever a man answers that he has divorced his

⁵⁸For a tradition on the authority of the Prophet which says that the effects of mistakes, forgetfulness, and coercion are not taken into account in the final judgment of a Muslim, see Muhammad b. Yazīd Ibn Māja, *Sunan*, 1:659. For a tradition that says people are judged by their intentions and that the intention that must precede a valid action has not been formulated by someone who acts out of forgetfulness or who makes a mistake in cases of divorce or manumission, see Bukhārī, *Sahih*, 2:215. Also, see Russell and Suhrwardy, #430 and note, for the absence of legal consequences in cases of mistakes or forgetfulness.

⁵⁹See AD 1.

wife and he wishes this answer to be the case, then divorce takes place."

§336 I said to Ahmad, "[What is the meaning of] the *ḥadīth* of 'Amr b. Haram: 'Divorce affects women the way inheritance does?'"

He said, "They are [all] affected by divorce. Don't they all inherit?"

I said, "Yes."

He said, "In the same way, it is possible for them all to be divorced."

Ishāq said, "Rather, he (i.e., 'Amr b. Haram) says, 'Divorce affects women the way inheritance does' because when one of four wives is divorced and it is not known which of them it is, then a quarter, or an eighth, is divided among all four, because it is not known which is the divorcée. But if all the wives come forward when the husband is alive, and each one claims that she is the one who was divorced, the matter is settled legally by drawing lots among them. If the husband says, 'I remember which one was divorced,' he is believed. However, as for what some say—that when the husband says, 'No, I do not remember which one was divorced,' he is allowed to choose, so that one of them will in fact be divorced from him—that is an error."

§337 I said to Ahmad, "What about a man who is born deaf, dumb, and blind and lives to grow up into a man?"

He said, "He is in the same legal position as a dead person. He stays with his parents."

I asked, "What if they were unbelievers and then they converted to Islam after he was a grown man?"

He said, "He is with them [so is considered Muslim, as they are]."

Ishāq said, "As he said. Such a man belongs to his parents' religion."

I said to Ishāq, "Can such a man be given in marriage?"

He said, "Definitely, his *walī* can give him in marriage. He can also be divorced, if his gestures are understood."

§338 Ahmad was asked about a man who has intercourse with a female slave of his and her mother.

He said, "It is forbidden for this man to have further sexual relations with either of them, but if he wishes, he can retain them as slaves."

Ishāq said, "What he said concerning sexual intercourse with them being forbidden is excellent."

§339 I said to Ahmad, "[What about the] divorce of a prepubescent youth?"

He said, "As long as the youth is adequately endowed with reason."

I said, "How old must he be?"

He said, "If he is adequately endowed with reason."

I asked him repeatedly, but he would not mention a specific age.

Ishāq said, "Whenever a youth has passed the age of twelve, fully comprehends what divorce means, and then divorces, his divorce action is valid, because a boy of twelve has reached puberty."

§340 I said to Ahmad, "[What happens] when a woman's husband is prepubescent and she is pregnant?"

He said, "Whoever rules in her favor (*yaqḍi lahā*) [does so] on the basis of [the child belonging to] the marriage bed. Indeed, he rules in this way if they both claim [the husband's paternity]. But when the husband is in a foreign land (*fī arḍin ḡharibatin*), it is known that he cannot have intercourse with her, and in that case the matter is not decided on the basis of [the child belonging to] the marriage bed."

But Ahmad mixed [two cases in his answer to] this question.

Ishāq said, "As Ahmad said, because the marriage bed belongs to the husband and he has intercourse with his wife on this basis. However, neither the prepubescent husband nor the absent husband has any [inheritance] claim, due to his children, to anything the children have made her the owner of (*mallakūhā*), if it is known that one is too young [to be a father] and the other is absent (i.e., the husband in the second hypothetical case) and hence has not had intercourse [with his wife]."⁶⁰

§341 Ahmad was asked about a divorcée who does not menstruate, but starts to menstruate after she has waited an *ʿidda* of two months.

He said, "She waits her [entire] *ʿidda* in terms of menstruation."

Ishāq said, "This is the way it is."

§342 I said to Ishāq, "[What about] a woman who nurses a certain man's son? Can this man marry any of the wet nurse's daughters?"

He said, "Whenever that woman bears children, they become this man's son's siblings, regardless of whether she gives birth to them before or after she has nursed him."

I said to Ishāq, "[What about] a woman who nurses a certain man's wife? Can this man marry any of this wet nurse's daughters?"

⁶⁰ See above, IK 323 and note.

Ishāq said, "They have not become his relatives. The only thing is, he cannot marry more than one of them, because they are sisters."

- §343 I said to Ishāq, "Can a man take two female slaves into his bed and have intercourse with both of them?"

He said, "Both of them can be with him in bed, but he cannot have intercourse with either of them unless a curtain is drawn between them. Further, once a boy has reached the age of five, or seven, years, a man should not have intercourse with a wife or a female slave of his, as long as the boy is in the same room, unless a curtain be placed as a barrier between the boy and the couple."

- §344 Ishāq was asked about a woman who says to her husband, "Divorce me!" And he says, "I cannot, because of your dower." [Then] she says, "I will relinquish my dower to you, if you divorce me," and he says, "I do so." [He was asked what happens if] she says, "I divorce myself triply."

Ishāq said, "That is valid." Then he said to me, "The legal effects [of this exchange] are, in this case, in accordance with her decision."

- §345 Ishāq was asked about a man who says, "I give this daughter of mine in marriage to your son." [He was asked what happens if] the father of the young man then says, "I accept" and does not mention a dower.

He said, "The marriage is valid, and the bride receives a fair dower."

Someone said, "What if her guardian gives her in marriage to a second man?"

He said, "The second man's marriage is not valid, nor does he owe her a dower on the basis of it, unless he has had intercourse with her."

- §346 Ishāq was asked about a man who gives an orphan in marriage to a husband who divorces her before she is sexually mature. He said, "She does not receive a dower, and she need not wait an *'idda*. Further, his divorcing her has no legal consequences, and he can marry her [again] after she has matured sexually."

- §347 I said to Ahmad, "[What about] a woman whose husband has divorced her triply and then disavowed that he divorced her?"

He said, "She must redeem from him what she is able to."

I said, "What if she is compelled to [remain in] that marriage?"

He said, "She should not adorn herself for him, nor should she come near him, and, if she possibly can, she should escape from him."

I said to him, "What about the *ḥadīth* of Ibn 'Umar?"

He said, "I do not know what it is. Ibrāhīm b. Muhājir did not think it was anything."

I said, "Should she fight him, when he desires her?"

He said, "I do not know. She should not fight him. Abū Ḥanīfa said she should fight him. She should escape from him, if she can."

I said, "What if she hears [of her divorce], or if two just witnesses attest to it?"

He said, "Her case is strongest if she hears [of it]."

[I said,] "Or, if two just witnesses do, or [at least] two witnesses who are not suspect?"

He said, "Yes. On the basis of all of this, she should not remain with him."⁶¹

- §348 Ahmad said, "When a man has intercourse with his wife's sister, he is kept from his wife until she—that is, his wife's sister—has waited three menstrual periods; or, if she does not menstruate, three months. If she has become pregnant, then until she gives birth."

- §349 Ahmad was asked whether the divorcee and the widow should wash their heads, anoint themselves, or dress in new clothes. The questioner listed a number of other activities of this kind.

Then Ahmad said, "I have given you the regulated case (*al-ʿaṣl*). Whenever she does something of this kind and does not wish by it to create doubt (i.e., about the fact that she is waiting her *'idda*), then there is no harm in it, except that she should not use dye or perfume."

- §350 Ahmad said, "Lodging for the triply divorced woman is more of an obligation (*awjābu*) than maintenance, because Allāh said, *Lodge them where ye dwell* (65:6)."

I said to Ahmad, "What about the *ḥadīth* of Ibn Sīmt? Do you not know of it?"

He said, "Yes, al-Sadūsī⁶² also used it as proof."

- §351 Ahmad was asked whether a man who frees a female slave of his can marry her.

He said, "Yes."

- §352 Ahmad was asked whether the prisoner should marry while he is one of the Byzantines' captives.

⁶¹See Ibn Māja, *Sunan*, 1:657, for a tradition that says if a woman claims she is divorced and provides one witness for her claim, her husband is asked to take an oath. If he swears he has not divorced her, he is believed. If he refuses to take an oath, his refusal is tantamount to a second witness in support of the wife's claim. This question is also discussed in Ibn Qudāma, 8:440–441.

He said, "He should not marry."

Someone said, "What if he fears for himself?"

He said, "He still should not marry."

§353 Ishāq was asked, "When a woman converts to Islam, what happens if her husband also converts either during, or after, her 'idda has ended?"

He said, "As long as she is waiting her 'idda, he has the right to return to her without a new marriage. However, when her 'idda has ended, he may seek her hand [again] if he wishes. Similarly, in the case of the woman who apostatizes, she is never separated from her husband until an attempt has been made to persuade her to return to Islam and she has refused, so is killed, or her 'idda comes to an end before she returns to Islam; then she is definitely separated from her husband."

§354 I said to Ahmad, "Is the property of the *mafqud* . . .⁶⁶ of his wife?"

He said, "Yes."

I said, "What happens when his property has been divided up and then he reappears?"

He said, "He recovers what he can find, but he is not owed what is not recoverable. Indeed, it was within the rights of his heirs to divide up his property, and they do not owe him anything."

Ishāq said, "It is as he said." He approved of what Ahmad said, and he was content with it.

§355 I said, "Does the [divorced] husband of the *mukhtalifa* take back from her more than he initially gave her?"

Ahmad said, "He should not take from her more than he gave her."

Ishāq said, "It is as he said."

I said, "Can there be a *khul'* [separation] without [the adjudication of] the judge (*sultān*)?"

Ahmad said, "It is valid without the judge."

Ishāq said, "As he said."⁶⁷

§356 I said, "What happens when a man divorces his wife singly or doubly and then slanders her during her 'idda?"

Ahmad said, "He can institute *li-ān* proceedings."

Ishāq said, "As he said."

I said, "[What if] he has divorced her *triple* [and then slanders her during her 'idda]?"

Ahmad said, "[In that case] he is flogged (i.e., receives a *ḥadd* punishment)."

I said, "What if she is separated from him by means of a single definite divorce?"

He said, "He is flogged."

Ishāq said, "It is as he said."

§357 I said, "*Khul'* is a separation and not a divorce."

Ahmad said, "*Khul'* is a separation and not a divorce; further, the wife has the right to herself. Then if they do return to each other, that is, if the husband remarries her, the marriage has three divorces behind it."⁶⁸

I said to Ishāq, "Explain *khul'* to me."

He said, "The *sunna* is [as follows]: Whenever a man wishes to separate from his wife by means of *khul'*, but she is anxious to return to her husband, and [at a certain point] he does not object to that (*lā yakrahu*), if he sends an arbitrator (*ḥakam*) [chosen] from his relatives and she sends one [chosen] from hers, and each spouse empowers his arbitrator to act on his behalf, then if he (i.e., either or both of the arbitrators) thinks there should be a separation, it is effected, and if not, then it [the marriage] remains valid. Then the two arbitrators meet, and the husband's arbitrator starts by asking the wife's what she holds against her husband with regard to food, drink, and clothing. Then her arbitrator speaks of her needs. Then the husband's arbitrator says to the wife's, 'Do you think that if he returns to her on the basis of what she wants, that she will be satisfied with that?'

"Thus [the two arbitrators go back and forth], the wife's arbitrator, like the husband's, [discussing] what concerns her, in the manner we have described. Then if the two of them think, on the basis of what they know of the couple, that husband and wife should remain together, then they inform their guardians.

"But if the two arbitrators think the couple should be separated, they separate them and do not mention divorce, because this is a separation without divorce. It is like a sale between two men. That is what Ibn 'Abbās said concerning separation.

"If [after such a separation] the husband and the wife wish to return to each other, then the husband marries her, with a *wali* and witnesses and a dower. There is no escape from that, because this [would] constitute a new marriage, as if [the husband were marrying] a stranger or the couple had been separated by a triple divorce.

⁶⁶ Mālik and Shāfi'i also say that a separation by means of *khul'* does not require a judge. See Mālik, *Mudawwana*, 2:343, and Shāfi'i, *Umm*, 5:197.

⁶⁸ See above, IK 302.

"Whenever the husband wants to mention a divorce, he divorces his wife singly for what he has given her. This has been called *khul'* with divorce. Or it is a single definite separation, or a double or triple divorce.

"We have shown the activity of the two arbitrators whenever there is a wish for reconciliation, and for each spouse to put up with the character of the other. In this case, two arbitrators are needed, as Allâh said, *Appoint an arbiter from his folk, and an arbiter from her folk . . . to the end of the âya* (4:35). But if the husband has despaired of his wife and does not want to return to her because of his despair, then the two *hakams* are not needed, for the husband can separate from his wife by means of *khul'* for the compensation of what she has of his, or for a compensation that the two of them designate. That is permissible. But it is not lawful for him to take from her more than he gave her. Further, if he is the one who feels antipathy toward her (*in kâna al-nushûz min qibalihi*), then it is not lawful for him to take back anything at all of what he has given her. If she is the one who feels antipathy toward him, then he can."⁶⁴

I said to Ishâq, "What if she says, 'I have bought from you three divorces for what I have of yours'? Or, what if she says, 'I have sold the likes of three divorces for what you have of mine'?"

Ishâq said, "She is separated from him triply."

I said to Ahmad, "How is *khul'* effected?"

He said, "Whenever he takes money from her, then it is a separation [by means of *khul'*]."

Ishâq was asked about a man who separates from his wife by means of *khul'*, then returns to her during her *'idda*, then divorces her before having intercourse with her.

He said, "Whenever a man has separated from his wife by means of *khul'*, his returning to her during her *'idda* is not valid. Indeed, it is legal for him [to return to her only on the basis of] a new marriage contract. This is the doctrine held by those who support the view that *khul'* is a single definite divorce, as well as by those who support the view that it is like a sale between two men."

He refused to call it "return" if *khul'* was the means of separating the couple (*idhâ waqa'a al-khul'*).

§358 I said, "What about a man who denies that he divorced his wife?"

He [Sufyân] said, "We make him take an oath [and if he lies], he is culpable."

Ahmad said, "If she knows [about the divorce], she recovers her property and whatever [else] she can from him."

Ishâq said, "In principle (*fi'l-ash*), it is as he said, if she has made certain [she is divorced]. However, if it is said to her, 'He has divorced you,' but he (i.e., the husband) denies that under oath, then she stays with him."

§359 I said, "Can a man accuse a woman of something she did in pre-Islamic times?"

Ahmad said, "That would make a man subject to a *hadd* punishment."

Ishâq said, "It is definitely as he said, because of the inviolability of Islam."⁶⁵

I said, "What if four men witness that a woman has committed adultery and one of them is her husband?"

Ahmad said, "Then the husband institutes *li'ân* proceedings against his wife, and the other three are flogged (i.e., for *qadhf*)."

Ishâq said, "It is as he said."

§360 I said, "What if a father gives a certain daughter of his in marriage to a man and then sends this man a different daughter with whom he has intercourse?"

Ahmad said, "She receives a dower on the basis of his having had intercourse with her, and he has no wife. The situation is in accordance with what 'Alî said: 'The father readies and sends to the prospective groom the daughter to whom he was initially married, and she is legally his.'"

Ishâq said, "It is as he said."

§361 I said, "What about selling an *umm al-walad*?"

Ahmad said, "I do not like it," and he adduced as proof the *hadith* of 'Amr b. al-'Âs—"Do not obscure for us the *sunna* of the Prophet.' The *'idda* of the *umm al-walad* is four months and ten days."

Ishâq said, "It is never lawful to sell these women because of the situation of [automatic] manumission into which they have entered and the intermingling of flesh and blood."

Ishâq also said, "If an *umm al-walad* is sold, the sale is not valid."

§362 I said, "What about a woman whose unborn child dies and who has a husband?"

⁶⁴See the discussion of the activities of the two arbitrators in Mâlik, *Muwatta'*, 3:213–214; Mâlik, *Mudawwana*, 2:367–372; and Shâfi'i, *Umm*, 5:194–195.

⁶⁵For references to traditions that embracing Islam makes a person and his possessions inviolable, see Wensinck, *Handbook*, s.v. "Inviolable," and *Concordance*, s.v. "hurma."

Ahmad said, "Her husband does not have intercourse with her, until it is ascertained whether she is pregnant."

Ishāq said, "It is as he said."

§363 I said, "Can a Muslim man institute *liʿān* proceedings against Christian, Jewish, and slave wives?"

Ahmad said, "Yes, because that is how he denies paternity. Allāh said, *Those who accuse their wives* (24:6), and this statement applies to all wives."

Ishāq said, "It is as he said, because they are wives. Allāh said, *Those who accuse their wives*."



APPENDIX

The Manuscripts—

Description and Critical Notes

Description

Compilation of Abū Dāwūd al-Sijistānī

This translation is based on a printed edition of Abū Dāwūd's compilation (Cairo 1353/1934) and a manuscript, *Zāhiriya ḥadīth* 334. The printed edition is based on a manuscript in Madina at the Kitābkhāna al-Mahmūdiyya li'l-Sultān Muḥammad al-Uthmānī (not in Sezgin). This manuscript is listed as number 90 in the section on *ḥadīth* in ʿUmar Riḍā, *Al-Muntakhab min makḥṣūṣāt al-Madīna al-munawwara* (Damascus, 1973). The preface to the printed compilation of Abū Dāwūd is by Shaikh Rashīd Riḍā, who explains that after the Madina manuscript was discovered, a merchant in Jidda agreed to subsidize its publication, and local scholars suggested that a Syrian scholar, Muḥammad Bahjat al-Baiṭār, be given the job of collating it with the *Zāhiriya* manuscript. After Baiṭār finished his collation, he advised that before publication Rashīd Riḍā undertake whatever further editing and explicating the manuscript required. Rashīd Riḍā goes on to say that he realized the extent of the superiority of the *Zāhiriya* manuscript to the one in Madina too late to make major revisions in the book. He did, however, provide footnotes indicating variant readings from the *Zāhiriya* manuscript.

The *Zāhiriya* manuscript is dated 266 and is mentioned by Schacht in *Aus Orientalischen Bibliotheken* (III) (p. 25), where he cites Helmut Ritter's identification of it in *Der Islam* (XVII): "The manuscript *Zāhiriya* 334 which Ritter discussed . . . contains a . . . *riwāya* which Abū Dāwūd heard directly from Ahmad. . . ."

For this translation, I have used a photocopy of the *Zāhiriya* manu-

script, since the collation in the book is uneven. I have indicated the differences between the two manuscripts in the notes to the text.

Compilation of 'Abd Allāh b. Aḥmad b. Ḥanbal

This translation is based on a photocopy of a manuscript in the Zāhiriya library, Zāhiriya Fiqh Ḥanbalī 2. I have also consulted a photocopy of a manuscript of this compilation in the Taimūriya Library (Taimūriya Fiqh 511). Zuhair Shāwīsh has printed the Zāhiriya manuscript, with a few explanatory notes, as *Masā'il al-Imām Aḥmad b. Ḥanbal* (Beirut, 1401/1981).

The Zāhiriya manuscript is not dated but seems to have been copied from Taimūriya 511, or both were copied from the same source. They share many minor errors in wording, and both have the same large gaps. However, the Zāhiriya manuscript was corrected from yet another version of 'Abd Allāh's compilation: in a number of places additions to the text are written in the margin, and often a word in the text will be rewritten in the margin with *ṣahha* written next to it.

Schacht identified and described both manuscripts: Zāhiriya Fiqh Ḥanbalī 2 (listed as 1, since he reverses Zāhiriya 1 and 2) in *Aus Orientalischen Bibliotheken* (1931), NR. 10B, p. 25; Taimūriya 511 in *Aus den Bibliotheken von Konstantinopel und Kairo* (1928), NR. 15, p. 36. Of Zāhiriya Fiqh Ḥanbalī 2, he says that it is a manuscript of average size, consisting of twenty-one quires of five double leaves. It is vocalized in some places and clearly written. The section titles are in red ink. The title of the book, written by a later hand, is *Kitāb fihi Masā'il 'Abd Allāh b. al-Imām Aḥmad b. Ḥanbal li-Wālidhi al-Imām Aḥmad Raḍiyya Allāh 'anhumā wa-Jawābātihā*. It is complete, but not dated.

Schacht says Taimūriya 511 is a fairly large volume of 344 pages. It is not too well preserved and is written in large, beautiful calligraphic handwriting. It was written in 773 and is sporadically vocalized. It is incomplete at the beginning and also in other parts.

Compilation of Ishāq b. Maṣṣūr al-Kausaj

This translation is based on a photocopy of Zāhiriya Fiqh Ḥanbalī 1, with corrections and additions made from a photocopy of Zāhiriya Fiqh Ḥanbalī 83. The latter is small, difficult to read, and not in good condition. Further, the responses are not in the same order, and it is missing some of the responses contained in Zāhiriya Fiqh Ḥanbalī 1. However, it contains a few responses not in Zāhiriya Fiqh Ḥanbalī 1 and some useful variants. I have included the extra responses in my

translation, and I indicate only the corrections and variants I have incorporated in the notes to the text.

Schacht identified and described both manuscripts in *Aus Orientalischen Bibliotheken* (1931), NR. 1, p. 25. He says of Fiqh Ḥanbalī 1 that it is a tall, medium-thick manuscript written in very old, clear writing. It is sporadically vocalized, and the titles are in Kufic. It is incomplete at the beginning, and the first extant leaf is in ruins. It is in seven parts.

Of Zāhiriya Fiqh Ḥanbalī 83, he says that it is a fairly small-sized, medium-thick manuscript, written in small, narrow, difficult writing with much scribbling in red throughout. It is complete and dated 789. This manuscript is not listed in Sezgin.

Critical Notes

Some of the manuscripts have a number for every page; others for every pair of facing pages. One combines both systems. I distinguish facing pages as "a" and "b."

Notes to the compilation of Abū Dāwūd al-Sijistānī

The published text = M; Zāhiriya *ḥadīth* 334 (pages 38a-44a) = Z. The chapter titles through §51 and immediately before §68 and §72 are not in Z.

- a. *bāb*: Z, *abwāb*.
- b. *'ammahā*: M, *ghammahā*, after which Riḍā reports a blank space; M adds *yadḥhab* followed by *rāḍiya*.
- c. *tazawwuj*: M, *tazwīj*, title not in Z.
- d. *tazawwuj*: M, *tazwīj*, title not in Z.
- e. *yakrahūnahu*: M, *yakrahuhu*.
- f. §12 and §13 reversed in M.
- g. *yakhshā*: M, *yajbunu*.
- h. *idhā tusta'maru wa'adhinat*: M, Z, *wayasta'miru idhā adhinat*.
- i. §29 and §30 reversed in M.
- j. *yalihā*: M, Z, *ya'tihā*.
- k. *an yakhliya*: M, *yakhli*.
- l. *al-tafwīd*: M, Z, *al-tafīr*.
- m. *alāisa lahā zaiduhu*: M, *alāisa hiya tarakathu*; Z (apparently), *alāisa hiya tuzakkhi*.

- n. *qāla na'am*: not in Z.
 o. §59 and §60 reversed in Z.
 p. §62 not in M.
 q. *wa ghairuhu wa'l-talāq qablu'l-nikāh* are only in Z, and the copyist has noted above them *haddhā laisa min kalām Abi Dāwūd raḥimahū'l-lāhu*.
 r. The response following this response in M and Z is the same as §77.
 s. §70 not in M.
 t. *ahl al-Madīna*: Z, *ahl al-dhimma*.
 u. *qāla Abū Dāwūd*: not in Z.
 v. *qāla*: not in Z.
 w. Several lines not clear. They suggest that an ambiguous divorce formula pronounced during a terminal illness should not, in fact, result in a divorce. M, Z, *in dakhaltu laki fī khairin aw sharrin wa'l-rajulu mariḍun ya'ūduhu qāla lā walā yashī'u janāzatahu akhāfu M, an yakūna haddhā thalāthan Z, an yaṭīfa haddhā fulānun*.
 x. *anqalibu*: M, *af'aluhu*.
 y. *kalāmihī*: M, Z, *khilāfihī*.
 z. *ilā safari hajj*: M, *ilā safar*.
 aa. *Zabrā*: Z, *dhabrā*; M, *al-barā*.
 bb. Following §89 M has the initial phrase of another response; Riḍā reports that a blank space follows it. There is no indication of a lacuna in Z.
 cc. *fa-qāla*: not in M.
 dd. *watabghiduhu*: M, *wa-bi-bo'dhi*.
 ee. *qāla lā yakūnu*: Z, *lā yakūnu qāla* (misreported in Riḍā's note).
 ff. Text corrupt. The rest of the question and Ibn Hanbal's answer are not clear. The problem concerns a negative conditional divorce statement. M, Z, *innahu lam yaḥal yuṭīhi imra'tahu wa-kāna mutazawwajan ilaihim qāla M, amlahū M, Z, wa-in qadamakum hukima lahu an yuṭīhi imra'tahu wa-in ṣaḥḥa 'indakum, falā yaḥillu lakum an tuṭīhi imra'tuhu*.
 gg. *in lam aṭa'ki*: M, Z, *in waṭīṭuki*.
 hh. *ya'ūduhu*: M, Z, *ya'tulu*.
 ii. §113 not in M.
 jj. *al-wālī*: Z, *al-hawālī*.
 kk. *al-wālī*: M, *awlā*.
 ll. M inserts *shai'*.
 mm. *yuradna*: M, *y.r.d.w.n* (Riḍā reports Z incorrectly).
 nn. *.* These few lines are corrupt. M, *shakakta*, Z, *ashakka*, M, Z, *fī tahālūf al-kaiḥa qālahu Aḥmad*, M, *ilā*, Z, *qālā fa-*, M, Z, *huwwa bainahumā nisfāni*.
 oo. Riḍā incorrectly reports that §146 is missing in Z.

- pp. Second *qāla* in M.
 qq. *an tutallaq bi-hā al-nisā'*: remainder of sentence not in Z.
 rr. *Ibn Hanbal*: not in M.
 ss. Z, word not clear; M, *t,k,m,l*.
 tt. This title and the following response are not in M.

Notes to the compilation of
 'Abd Allāh b. Aḥmad b. Hanbal

Zāhiriya Fiqh Hanbali 2 (pages 254–307) = Z; Taimūriya 511 (pages 230–310) = T. Printed version = Bk and is in agreement with Z unless specifically noted.

- a. *fa'in kāna*: T, *kāna*.
 b. *kam haddahā*: T, *lam ya'khdhuhā*.
 c. *min qibalihā*: T, Z, *min qibalihim*.
 d. Title omitted in Bk.
 e. *fa'in adhinat*: Z, *fa'idhā mā rāddat*.
 f. *nāsin aw ghairu nāsin*: T, Z, *nāsi ghairu nāsi*; Bk, ellipsis.
 g. Title omitted in Bk.
 h. *innahu*: T, *innahā*; Z, *innamā*.
 i. *bi'annah*: Bk, *li'annah*.
 j. *faqālat*: Z, *faqāla*.
 k. *tāma*: Bk, *nāma*.
 l. *yaḥa'ahā*: T, Z, *y t l q*; Bk, ellipsis.
 m. *bābu'l-radā'*: Bk, *bābu mā yaḥrumu min al-radā'*.
 n. *ammatan*: T, Z, *ammatahu*.
 o. *fatazawwajahā*: T, Z, *fatazawwajahu*.
 p. *imra'atun*: T, Z, *imra'tuhu*.
 q. *Habība*: T, Z, *Ḥamnatu*.
 r. *Jumhān*: T, Z, not clear; Bk, *Juhmān*.
 s. *tilka'l-ṣaghira'l-amma*: Bk, *wa'l-amma*.
 t. *yudabbiju*: Bk, *y d b h*.
 u. Z adds *haddathanā* after title.
 v. *nawā aw lam yanwī fihī kaḥāratu'l-ṣiḥār*: T, Z, *nawā aw lam yanwī qāla fihī kaḥāratu'l-talāq*.
 w. *qāla*: not in T.
 x. Z adds *haddathanā* after title.
 y. *Sufyān*: T, *Shā'bān*.
 z. *Shu'ba*: Z, *Sa'id*.
 aa. *iḥdāhumā*: Z, *aḥdathahumā*.
 bb. *tadda'* in Bk: not in T, Z.

- cc. *Wakīfu qāla hadīthu*: not in T.
 dd. *shai'an qabla an yadkhulu bihā wa'in lam yu'tihā ilā ba'da dhālika rajawtu an yakūna*: not in T. T, Z add *rajawtu an yakūna*; meaning uncertain.
 ee. Incomplete in T and Z.
 ff. *fa'innahu*: T, Z, *ha'innahu*.
 gg. *walā al-kāfiru min al-muslimi*: not in Bk.
 hh. "... with her consent while he is acting as her *wali*." These words and the next sentence not in T.
 ii. *qur'a*: Bk, *qara'a*.
 jj. *su'ila* in Bk: T, Z, *is'al* or *as'alā*.
 kk. *fala'isa talāquhu bi shai'in*: T, *fala'isa talāquhu bishai'in*.
 ll. *in*: not in T, Z.
 mm. *abi*: not in T.
 nn. *bi-'Utha*: T, Z, *bi-'aimih*.
 oo. Text and meaning not clear: *yu'tiquna fi'l-thulthi(?) yabi'ūnahā*.
 pp. *yahdimu'l-zawju'l-thalāthu walā yahdimu'l-wāhidatu wala'l-thanataini talāqun jadidun wanikāhum jadidun*. If second word is amended to *zawāj*, the general sense of these lines is that a couple's third divorce is final.
 qq. *walā 'itqa*: T, Z, *wa'l-'itqu*.
 rr. *qāla*: not in Z.
 ss. This repeat is not in Z.
 tt. *ja'alāhā*: not in T.
 uu. *ra'aituhu*: Bk, *rātabahu*.
 vv. Lacuna in T and Z; words in brackets suggested.
 ww. *fa'in kāna'l-fa'i*: T, Z, *fakāna*.
 xx. *idhā waqafa immā an yaf'a wa'immā an yutalliqahā*: not in T.
 yy. *illā yaf'a'ahā*: T, Z, *lā yaf'a'ahā*.
 zz. Salama: Bk, Maslama.
 aaa. *haraj*: Bk, *kharaj*.
 bbb. *yutaqūna bi'itqihā wayuraqqūna*: T, *yu'taqūna ukhtahā wayarithūna*; Z, *ya'taddūna ukhtahā wayarithūna*.
 ccc. *'asharan*: not in T.
 ddd. *maqūma'l-hidatāin*: not in Z.
 eee. T, Z reverse this and the previous sentence.
 fff. This paragraph and the previous one are not in T.
 ggg. *nisā'ihimā*: T, Z, *nisā'ihinna*.
 hhh. *al-amma*: T, Z, *al-āya*.
 iii. *fa'l-zāhiru minhā annahā turabbišu arba'ata ashurin*: not in T.
 jjj. *al-ṣaghīratu idhā 'ataddat bi'l-ashuri thumma ḥadāt fi'l-sidda*: not in Bk.

Notes to the compilation of

Ishāq b. Maṣṣūr al-Kausaj

Zāhiriya Fiqh Hanbali I (pages 23b-42a) = Z1; Zāhiriya Fiqh Hanbali 83 (pages 49b-83b) = Z83.

- a. *aw al-jadd wa'l-ibn*: Z1, *aw al-ibn*.
 b. lacuna in Z1, Z83.
 c. *li-Zabrā*: Z1, *an yarā*.
 d. §88 only in Z83.
 e. This statement of Ibn Hanbal's together with Ibn Rāhwayh's agreement is misplaced; see above, IK 27.
 f. *al-amma*: not in Z1.
 g. "What . . . four months" not in Z1.
 h. *a'sāhā*: Z1, Z83, *asābahā*.
 i. *qultu*: Z1, Z83, *qāla Ahmad*.
 j. Text not clear here: Z1, Z83, *qiyād kalāmihim wa-dhālika lammā ajma'ū an al-mudda'a 'alaihī nakala (?) al-huquq mi'atu alfin aw aktharu idhā lam yuqirra* . . .
 k. Z1, Z83, lacuna of several words.
 l. §167 only in Z83.
 m. §172 only in Z83.
 n. Z1, Z83, several words not clear: *al-ūlā aḥsanu ḥālan (?)*.
 o. This sentence in Z83 only; lacuna in Z1.
 p. Z1, Z83, text garbled: *qawluhu talāqu (or taluqat) imra'ati kadhā wa-kadhā*.
 q. *Qur'ān, ta'āsartum*: Z1, Z83, *ta'āsari*.
 r. *min ammatihī*: Z1, *min imra'atin*.
 s. Z1, Z83, reading uncertain: *ilā an yakūna (?) bi-fidā' waladihī*.
 t. *Sufyān* only in Z83.
 u. *sa'altu Sufyān*: Z1, *qāla Sufyān*.
 v. Z1, Z83, last word of this response not clear.
 w. *fa'in lam yakun dakhala*: Z1, *fa'in dakhala*.
 x. *lā tujladu lahu fa'in lā'anathu*: Z83, *lā tujladu lahu zawju'l-mar'ati la'anathu*; Z1 breaks off the paragraph after "slandered."
 y. Z1, Z83, Najbiya.
 z. Z1, Z83, *al-Samit (?)*.
 aa. Z1, Z83, *al-Sadūs*.
 bb. Z1, Z83, word in text not clear.



WORKS CITED

Arabic Sources

- Abū Dāwūd, Sulaimān b. al-Ash'ath al-Sijistānī. *Sunan* on the margin of Mālik's *Muwatta'*. 4 vols. Cairo, 1310 A.H.
- Abū Yūsuf, Ya'qūb b. Ibrāhīm. *Kitāb al-āthār*. Edited with commentary by Shaikh Abu'l-Wafā'. Cairo, 1355 A.H.
- al-Baidāwī, Nāsir al-Dīn. *Commentarius in Coranum*. Edited by H. O. Fleischer. 2 vols. Photographic reproduction of the 1846–48 Brill Edition. Osnabrück, 1968.
- al-Bukhārī, Abū 'Abd Allāh Muḥammad b. Ismā'īl. *al-Jāmi' al-ṣaḥīḥ*. 4 vols. Cairo, 1400 A.H.
- al-Dārimī, 'Abd Allāh b. 'Abd al-Rahmān. *Sunan*. Cawnpore, 1876.
- Ibn Abī Ya'fā, Abū'l-Ḥusain Muḥammad. *Tabaqāt al-Hanābila*. Edited by Muḥammad Hāmid al-Fiḡī. 2 vols. Cairo, 1952.
- Ibn Hanbal, Ahmad. *Kitāb al-'ilal wa ma'rifa al-rijāl*. Edited by Talāt Kocyigit and Ismail Cerrahoglu. Ankara, 1963.
- . *Kitāb Masā'il al-Imam Ahmad*. Edited by Muḥammad Bahjat al-Baitār. Cairo, 1353/1934.
- . *Masā'il al-Imam Ahmad b. Hanbal*. Edited by Zuhair Shāwīsh. Beirut, 1399/1979.
- . *Masā'il al-Imam Ahmad b. Hanbal*. Edited by Zuhair Shāwīsh. Beirut, 1401/1981.
- . *Musnad*. 6 vols. Cairo, 1895. Reprint. Beirut, 1985.
- Ibn Māja, Muḥammad b. Yazīd. *Sunan*. Edited by Muḥammad Fu'ād 'Abdu'l-Bāqī. 2 vols. Cairo, 1952–1953.
- Ibn al-Nadīm. *Kitāb al-fihrist*. Edited by G. Flügel. Leipzig, 1871. Reprint. Beirut, 1964.
- Ibn Qudāma, Muwaffaq al-Dīn. *al-Mughnī*. Edited by Shaikh Rashīd Ridā. 12 vols. Cairo, 1929. Reprint. Beirut, 1983.
- Ibn Qutaiba, 'Abd Allāh b. Muslim. *Kitāb al-ma'ārif*. Edited by Ferdinand Wüstenfeld. Göttingen, 1850.

- Ibn Rāḥwayh, Ishāq. *Musnad*. Fragment edited by Jamila Shaukat in "A Critical Edition of Tradition by 'Ā'ishah." Ph.D. diss., Cambridge University, 1984.
- Ibn Sa'd, Muḥammad. *Kitāb al-ṭabaqāt al-kabīr*. Edited by Eduard Sachau. 9 vols. Leiden, 1905–1940.
- al-Khiraqī, Abū'l-Qāsim. *Mukhtasar*. Damascus, 1964.
- Mālik b. Anas. *al-Mudawwana al-kubrā*. 16 vols. Cairo, 1905–1906. Reprint. 6 vols. Baghdad, n.d.
- . *Muwatta' al-Shaibānī*. Commentary by 'Abdalhai Laknawī. Lucknow, 1909.
- . *Muwatta' Yahyā b. Yahyā*. Commentary by Muḥammad al-Zurqānī. 4 vols. Cairo, 1379/1959.
- al-Nasā'ī, Ahmad b. Shu'aib, *Sunan*. Commentary by Jalāl al-Dīn al-Suyūfī. 6 vols. Beirut, n.d.
- Riḍā, 'Umar. *Al-Muntakhab min makhtūṭāt al-Madina al-munawwara*. Damascus, 1973.
- al-Shaibānī, Muḥammad b. al-Hasan. *Al-Jāmi' al-kabīr*. Cairo, n.d.
- al-Shāfi'i, Muḥammad b. Idrīs. *Kitāb al-umm*, with *Mukhtasar al-Muzanī*. 8 vols. in 6. Beirut, n.d.
- al-Shīrāzī, Abū Ishāq. *Tabaqāt al-fuqahā'*. Beirut, 1970.
- al-Subkī, Tāj al-Dīn. *Tabaqāt al-Shāfi'iya al-kubrā*. 6 vols. Cairo, 1906.
- al-Ṭabarī, Abū Ja'far Muḥammad b. Jarīr. *Ikhtilāf al-fuqahā'*. Edited by Joseph Schacht. Leiden, 1937.
- . *Jāmi' al-bayān 'an ta' wil ay al-Qur'ān*. 15 vols. Cairo, 1960.
- al-Tirmidhī, Muḥammad b. 'Isā. *Sunan*. 5 vols. Cairo, 1964.

Secondary Studies and Translations

- Abbott, Nabia. *Ā'ishah the Beloved of Muḥammad*. Chicago, 1942. Reprint. New York, 1973.
- . *Studies in Arabic Literary Papyri*. 2 vols. Chicago, 1967.
- Bell, Richard. *A Commentary on the Qur'ān*. 2 vols. Journal of Semitic Studies Monograph, no. 14. Manchester, 1991.
- Burton, John. *The Collection of the Qur'ān*. Cambridge, 1977.
- . "The Meaning of 'Ihsan.'" *Journal of Semitic Studies*, 19 (1974): 47–75.
- . *The Sources of Islamic Law: Theories of Abrogation*. Edinburgh, 1990.
- Burton, Richard F. *The Book of the Thousand Nights and a Night*. 10 vols. Burton Club Edition.
- Coulson, N. J. *Succession in the Muslim Family*. Cambridge, 1971.

- Encyclopaedia of Islam*. 4 vols. and Supplement. Leiden, 1913–1938. New Edition. Leiden, 1954–.
- Goldziher, Ignaz. *Muslim Studies*. Edited by S. M. Stern. Translated by S. M. Stern and C. R. Barber. London, 1971.
- . "Neue Materialien zur Literatur des Überlieferungswesens bei den Muhammedanern." *Zeitschrift der Deutschen Morgenländischen Gesellschaft*, 50 (1896): 465–506.
- . "Über Geheimen bei den Arabern." *Globus* 68(1895): 32–34.
- . *The Zāhiris: Their Doctrine and Their History*. Translated and edited by Wolfgang Behn. Leiden, 1971.
- Guillaume, Alfred. *A Translation of Ibn Ishāq's "Sirat Rasūl Allāh."* Lahore, 1967.
- Hamilton, Charles. *The Hedaya: A Translation of Marghinānī's al-Hidāya*. Lahore, 1957.
- Hawting, G. R. "The Role of Qur'ān and Hadīth in the Legal Controversy about the Rights of a Divorced Woman during Her 'Waiting Period' ('idda)." *Bulletin of the School of Oriental and African Studies*, 52 (1989): 430–445.
- Jeffery, Arthur. *Materials for the History of the Text of the Qur'ān*. Leiden, 1937.
- Juynboll, T. W. *Handbuch des Islamischen Gesetzes*. Leiden, 1910.
- Khadduri, Majid. *Islamic Jurisprudence: Shāfi'i's Risāla*. Baltimore, 1961.
- Koran. Translated by Marmaduke Pickthall. *The Meaning of the Glorious Koran*. London, 1930.
- Lane, Edward William. *Arabic-English Lexicon*. Book I. 8 parts. Edited by Stanley Lane-Poole. Reprint. Beirut, 1980.
- Laoust, Henri. "Le Hanbalisme sous Le Califat de Baghdad." *Revue des études islamiques*, 27 (1959): 67–128.
- Madelung, Wilfred. "Shi'i Attitudes toward Women as Reflected in Fiqh." In *Society and the Sexes in Medieval Islam*, edited by Afaf Lutfi al-Sayyid-Marsot. Sixth Giorgio Levi Della Vida Conference. Malibu, 1979.
- Musallam, B. F. *Sex and Society in Islam*. Cambridge Studies in Islamic Civilization. Cambridge, 1983.
- Patton, W. M. *Ahmad Ibn Hanbal and the Mihna*. Leiden, 1897.
- Robertson-Smith, W. *Kinship and Marriage in Early Arabia*. Boston, n.d.
- Russell, A. D., and A. Suhrawardy. *A Manual of the Law of Marriage: From the Mukhtasar of Sidi Khalil*. London, n.d.
- Schacht, Joseph. "Adultery as an Impediment to Marriage." *Revue internationale des droits de l'antiquité, 2ième series*, 1 (1952): 105–123.

- . *An Introduction to Islamic Law*. Oxford, 1964.
- . *Aus Orientalischen Bibliotheken, I, III. Abhandlungen der Preussischen Akademie der Wissenschaften, Phil.-hist. Klasse, Jhrg. 1928*, no. 8 (= *Aus dem Bibliotheken von Konstantinople und Kairo*); Jhrg. 1931, no. 1.
- . *The Origins of Muhammadan Jurisprudence*. Oxford, 1950.
- . "Theology and Law in Islam." In *Theology and Law in Islam*, edited by G. E. von Grunebaum. Second Giorgio Levi Della Vida Conference, University of California at Los Angeles. Wiesbaden, 1971.
- Sezgin, Fuat. *Geschichte des Arabischen Schrifttums*. Vol. 1. Leiden, 1967.
- Shorter Encyclopedia of Islam*. Ithaca, 1961.
- Spectorsky, Susan A. "Ahmad b. Hanbal's *Fiqh*." *Journal of the American Oriental Society*, 102 (1982): 461–465.
- Stern, Gertrude H. *Marriage in Early Islam*. London, 1939.
- Watt, W. M. *Muhammad at Medina*. Oxford, 1977.
- Wensinck, A. J. *Concordance et indices de la tradition musulmane*. 8 vols. Leiden, 1936–1988.
- . *A Handbook of Early Muhammadan Tradition*. Leiden, 1960.
- Wright, W. A. *Grammar of the Arabic Language*. 2 vols. 3rd ed. Cambridge, 1967.
- Ziadeh, Farhat. "Equality (*kafā'ah*) in the Muslim Law of Marriage." *American Journal of Comparative Law*, 61 (1957): 503–517.



Index of Qur'ān Verses

References to Chapter I are by page number; references to the three compilations are by section number.

2:226	AA §156; IK §53; IK §277	18:60–82	AA §128n
		18:63	AA §122
2:226–227	43; AA §124; IK §102	23:12–14	AD §56n
2:228	AA §135, 155	24:2	46n.162
2:229–230	50; AA §57	24:4	46n.161
2:232	IK §174	24:6	AD §135; AA §153; IK §363
2:234	53; AD §153n; AA §135, 154	24:7–9	IK §115
2:235	IK §205	24:11–19	46n.163
2:236	17	24:31	AA §38
2:237	16	33:4	39n.137
4:4	16	33:28–29	48
4:11	AA §88	33:49	53
4:20	16	42:25	IK §23n
4:22	AA §50, 88	58:2–4	39; AA §132
4:22–23	IK §48, 50	58:3	AA §153
4:23	22; AA §23, 88	58:4	AD §111, 113; IK §101
4:24	16, 38; IK §49	60:10	IK §296
4:25	15; IK §304	65:4	52, 54; AA §136, 163
4:35	IK §357	65:6	57, 58; AD §160; IK §207, 350
5:5	15, 16		



Index of Names

Names of persons mentioned only in *ināds* are not included. Death dates (both the Muslim and Christian year) are given for some of the more prominent of the Companions of the Prophet, for the Successors, and for later scholars. The initial Arabic article *al-* is ignored in alphabetization. References to Chapter 1 are by page number; references to the three compilations are by section number.

- al-'Abbās, Companion of the Prophet, AA §15
 'Abd Allāh b. 'Abbās. *See* Ibn 'Abbās
 Abd Allāh b. Ahmad b. Hanbal (d. 290/903), Baghdad, son of Ibn Hanbal, jurist, traditionist, 1–58 passim; AA § passim
 'Abd Allāh b. Ja'far, contemporary of the Prophet, AA §87; IK §251
 'Abd Allāh b. Mas'ūd. *See* Ibn Mas'ūd
 'Abd Allāh b. 'Umar. *See* Ibn 'Umar
 'Abd al-Malik b. 'Umar (d. 136/753), Kufa, Successor, AD §23
 'Abd al-Rahmān b. 'Auf (d. 31 or 32/651 or 652), Companion of the Prophet, 11–12; IK §79, 112
 'Abd al-Rahmān b. Mahdi (d. 198/814), Basra, traditionist, AA §64
 'Abd b. Zam'a, contemporary of the Prophet, IK §43, 233
 Abū 'Amr b. Hafs, contemporary of the Prophet, 57
 Abū Dāwūd Sulaimān b. al-Ash'ath al-Sijistānī (d. 275/888), Baghdad, jurist, traditionist, 1–59 passim; AD passim
 Abū Hanifa (d. 150/767), Kufa, jurist, IK §195, 347
 Abū Hudhaifa, Companion of the Prophet, 12, 14
- Abū 'Al-ʿĀs b. al-Rabīʿ, Companion of the Prophet, AA §29
 Abū 'Dardā' (d. 32 or 34/652 or 654), Companion of the Prophet, AA §124
 Abū Mūsā al-Ash'arī (d. 42/662), Companion of the Prophet, governor of Basra, IK §36
 Abū Naṣr Muḥammad b. Hafs (fl. 236/850), Baghdad, jurist, traditionist, AD §1
 Abū Sa'īd al-Khudrī (d. 74/693), Companion of the Prophet, 38; AD §139; IK §304
 Abū 'Ubayd, al-Qāsim b. Sallām (224/838), Qur'ān commentator, jurist, traditionist, widely traveled, IK §257
 Aflah b. Ja'd, contemporary of the Prophet, IK §92
 Ahmad b. Muḥammad b. Hanbal (241/853), Baghdad, jurist, theologian, traditionist, passim; attitude toward traditions, 7; life and works, 2–3
 'Ā'isha bt. Abī Bakr (d. 58/678), wife of the Prophet, 12, 18, 48, 52; AD §163; AA §17, 31, 64, 102, 109, 124, 161; IK §81, 90, 91, 92, 146, 216, 304
 'Alī b. Abī Tālib (d. 40/661), Companion and cousin of the Prophet, Caliph, 18; AD §157; 164; AA §50, 74, 75, 106,

Index of Names

- 109, 123, 124, 155; IK §10, 18, 28, 295, 304, 318
 'Alqama (d. 62/681), Companion of the Prophet, AA §133; IK §146, 174
 'Ammār b. Yāsir (d. 37/657), Companion of the Prophet, AA §125
 'Amr b. al-'Ās, 'Abd Allāh (d. 65/684), Companion of the Prophet, IK §204, 221
 Anas b. Malik (d. 91/711), Companion of the Prophet, AA §99; IK §304, 322
 al-Ash'ath b. Qais, Companion of the Prophet, IK §20
 'Atā' b. Abī Rabāh (d. 114/732), Madina, Successor, AD §128; IK §79, 204, 265
 Aus b. Sāmīt, contemporary of the Prophet, 39
 al-Auzā'ī (d. 157/773), Syria, jurist, IK §225, 245, 305, 306
 Banū (*sons of*) 'Adī, tribe, contemporary with the Prophet, AD §84 n
 Banū 'Amīr, tribe, contemporary with the Prophet, AA §26
 Banū Murra, tribe, contemporary with the Prophet, AA §26
 Barira, Contemporary of the Prophet, 38; AD §138; IK §304
 Barwa' bt. Wāshiq al-Ashja'i, contemporary of the Prophet, 20; IK §21, 88
 al-Dahhāk b. Muzāhim (d. 105/723), Khurasan, Successor, Qur'ān commentator, AD §171; AA §75
 Fāṭima bt. Muḥammad (d. 11/633), daughter of the Prophet, 18
 Fāṭima bt. Qais, contemporary of the Prophet, 14, 57; AD §8, 159, 160; AA §110; IK §75
 Fura'a bt. Sinān, contemporary of the Prophet, IK §318
 Habbān b. Munqidh, Companion of the Prophet, AD §157 n
 Habiba bt. Sahl, contemporary of the Prophet, 50, 51; AA §56, 58; IK §80
 Hafa bt. 'Umar (d. 45/665), wife of the Prophet, 49; AD §84; IK §81
 al-Hakam b. 'Utaiba (d. 117/735), Kufa, Successor, AA §15, 101; IK §317
 Hammād b. Abī Sulaimān (d. 120/738), Kufa, Successor, AA §101; IK §115
 al-Hārith b. al-Hakam, contemporary of the Prophet, AA §26
 al-Hasan al-Basrī (d. 110/728), Basra, Successor, traditionist, AA §110, 134, 153; IK §32, 79, 224, 225, 226, 228
 Ibn 'Abbās, 'Abd Allāh (d. 68/687–688), Companion of the Prophet, Qur'ān commentator, 51; AD §1, 12, 73, 138; AA §29, 38, 57, 58, 60; IK §27, 38, 49, 58, 89, 115, 140, 204, 302, 304, 357
 Ibn Abī Lailā (d. 148/765), Kufa, judge, IK §1, 225
 Ibn 'Ajlān, Muḥammad (148/765), Madina, traditionist, AD §171; IK §56
 Ibn Idrīs, 'Abd Allāh (fl. 145/762), traditionist, IK §318
 Ibn Mahdi, 'Abd al-Rahmān (d. 198/814), Basra, jurist, traditionist, IK §318
 Ibn Mas'ūd, 'Abd Allāh (32/652), Companion of the Prophet, 52; AD §138, 139, 157, 164; AA §133; IK §146, 304, 315, 322
 Ibn Qasim al-Utaqi (d. 191/806), Maliki jurist, 8–58 passim
 Ibn 'Umar, 'Abd Allāh (73 or 74/692 or 693), Companion of the Prophet, son of the Caliph 'Umar, 27 n.95; AD §33, 166; AA §75, 105, 123, 132, 137, 164; IK §36, 38, 113, 132, 140, 187, 204, 224, 315, 322, 347
 Ibn Rāhwayh, Ishāq b. Ibrāhīm (d. 238/853), Baghdad, Hanbali jurist, traditionist, 1–59 passim; AD §38; IK passim
 Ibn Sirin. *See* Muḥammad b. Sirin
 Ibn Wahb (d. 197/812), Egypt, Maliki jurist, 5
 Ibn Zubair, 'Abd Allāh (d. 73/692), Madina and Mecca, Successor, 36
 Ibrāhīm al-Nakha'i (d. 96/715), Kufa, Successor, AA §105; IK §79, 225, 259, 265
 'Ikrima (d. 105 or 107/723 or 725), Madina, Successor, AA §29, 96
 'Imrān b. al-Husain (d. 52/672), Basra, Successor, AA §23

Index of Names

- Jabala b. 'Amr, Companion of the Prophet, AA §87
- Jabir b. Zaid (d. c. 100/718), Basra, Successor, IK §79, 204
- Jacob, Patriarch, IK §50
- Juwairiya, wife of the Prophet (d. 56/676), 18
- Ka'b al-'Ujra, Companion of the Prophet, AA §50
- Kasla bt. Mas'ud, contemporary of the Prophet, AA §87
- al-Kausaj, Ishāq b. Mansūr (d. 251/865), Merv, jurist, traditionist, 3–59 passim; IK passim
- Khadīja (d. 619), wife of the Prophet, 18
- Khansa' bt. Khudhām, contemporary of the Prophet, 10; AD §20; IK §1
- Khula (or Khuwaila) bt. Tha'laba, contemporary of the Prophet, 39
- Laith b. Abī Sulaim (d. 143/760), Egypt, traditionist, IK §317
- Leah, wife of Jacob, IK §50
- Maimūna bt. al-Hārith (d. 61/681), wife of the Prophet, 18; AA §15
- Mā'iz b. Malik, contemporary of the Prophet, IK §268
- Makhūl b. Zaid (d. 112 or 118/731 or 737), Damascus, Successor, 53; AA §154
- Malik b. Anas (d. 179/795), Medina, jurist, traditionist, 1–58 passim; AD §127; AA §125; IK §99, 146, 225, 318
- Ma'mūn (d. 218/833), Abbasid Caliph, 2
- Mansūr b. al-Mu'tamir (d. 132/749), Kufa, traditionist, AA §133
- Marwān b. al-Hakam (d. 65/685), governor of Medina and Umayyad Caliph, AA §26
- Miqsam b. Bujra (d. 110/778), Mecca, Successor, AA §15
- Mu'awiya (d. 60/680), Umayyad Caliph, 14
- al-Mughira b. Shu'ba (d. 48 or 51/668 or 671), Companion of the Prophet, 11; AD §23; AA §75, 119; IK §16
- Muhammad, the Prophet, 10; AD §7; AA §29, 31, 36, 56, 68, 71, 86, 92, 99,
- 108, 109, 110, 124, 153, 155; IK §1, 7, 41, 60, 80, 91, 127, 164, 201, 315, 316
- Muhammad b. Sirin (d. 110/778), Basra, Successor, 53; AA §106, 154; IK §16, 18
- Muhammad b. Yahyā b. Hibbān (d. 121/739), Medina, Successor, IK §146
- Mujāhid b. Jabr (104/727), Mecca, Successor, IK §204
- Mujazziz al-Mudlīlī, contemporary of the Prophet, AA §102
- Mustaliq, Sons of, tribe, contemporary with the Prophet, 18; IK §216
- al-Nadīr, Jewish tribe of Medina, contemporary with the Prophet, 18
- Nāfi' b. 'Umar (d. 117/735), Medina, Successor, IK §204
- al-Nu'mān b. Bashīr, contemporary of the Prophet, IK §60, 61
- Prophet. *See* Muhammad, the Prophet
- al-Qāsim b. Muḥammad (d. 106/725), Medina, Successor, IK §92
- Qatāda b. Di'āma (d. 117 or 118/735 or 736), Basra, Successor, AD §28
- Rachel, wife of Jacob, IK §50
- Rāfi' b. Sinān, contemporary of the Prophet, IK §201
- Rajā' b. Haiwa (d. 112/730), Damascus, Successor, AA §119
- Rukāna b. 'Abd al-'Azīz, contemporary of the Prophet, 30; AD §73; IK §315
- al-Sadūsī, 'Ārim Abu'l-Nu'mān (d. 224/839), Basra, traditionist, IK §350
- Sāfiya (d. 50 or 52/670 or 672), wife of the Prophet, 18; AA §99
- Sahl b. Sa'd al-Sā'idī (d. 88 or 91/707 or 710), Companion of the Prophet, 17
- Sahla, contemporary of the Prophet, 24
- Sabnūn (d. 240/854), Kairawan, Maliki jurist, 5, 8–58 passim
- Sa'id b. Jubair (d. 95/713), Kufa, Successor, AA §124; IK §204
- Sa'id b. al-Musaiyab (d. 94/712), Medina, Successor, AA §153; IK §225
- Samura b. Jundub (d. 60/679), Compan-

Index of Names

- ion of the Prophet, AD §128; AA §75
- Saudā', contemporary of the Prophet, AA §31; IK §43
- al-Sha'bi, Abū 'Amr 'Āmir (d. 110/728), Kufa, Successor, AA §100, 110; IK §79, 204, 229, 262
- Shāfi', Muḥammad b. Idrīs (d. 204/820), Baghdad and Egypt, jurist, traditionist, 1–58 passim; AA §97, 119
- Shaibānī Muḥammad b. al-Hasan (d. 189/805), Kufa, Hanafi jurist, 12
- Shu'ba b. Hajjāj (d. 160/776), Basra, traditionist, AA §15
- Shuraih, first century of Islam, judge, IK §242, 255
- Sufyān al-Thaurī (161/772), Kufa, traditionist, AA §124
- Sufyān b. 'Uyaina (d. 198/813), Mecca, jurist, traditionist, 3, 6; IK passim
- Sulaimān b. Yāsār (107/725), Medina, Successor, AA §132
- Tawūs b. Qaisān (d. 106/724), Yemen, Successor, AA §60; IK §204, 225
- Thābit al-Ahnaf, Companion of the Prophet, 36; AA §125
- Thābit b. Qais b. Shammās, Companion of the Prophet, 50, 51; AA §56; IK §80, 140
- Tumādīr, contemporary of the Prophet, IK §112
- 'Ubad b. 'Umayr (d. 74/642), Companion of the Prophet, IK §104
- 'Ubayy b. Ka'b (d. 22/642), Companion of the Prophet, AD §144; AA §140
- 'Umar b. 'Abd al-'Azīz (d. 102/720), Umayyad Caliph, 55; AD §115; IK §201
- 'Umar b. al-Khattāb (d. 23/644), Caliph of Medina, 12, 18, 27 n.95; AD §171; AA §75, 78, 123, 124, 133, 155; IK §19, 20, 24, 35, 41, 79, 104, 122, 146, 201, 216, 315, 318
- Umm Habiba (d. 44/664–665), wife of the Prophet, 18
- Umm Hakin bt. Qāriq, contemporary of the Prophet, 14; AD §7
- Umm Kalthūm bt. 'Alī, contemporary of the Prophet, AA §87; IK §318
- Usāma b. Zaid b. Hāritha (d. 54/673), Companion of the Prophet, 14; AD §7
- 'Utba, contemporary of the Prophet, AA §102; IK §43
- 'Uthmān b. 'Affān (d. 35/656), Caliph of Medina, AD §157; AA §28, 57, 78, 119, 124, 137, 140, 164; IK §79, 112, 132, 140, 146, 315
- Yazīd b. Harūn (d. 206/821), Wāsiṭ, Qur'ān commentator, traditionist, IK §318
- Zabrā', contemporary of the Prophet, 49; AD §84; IK §81
- Zaid b. Arqam, Companion of the Prophet, IK §122
- Zaid b. Thābit (d. 45/665), Companion of the Prophet, AA §26, 123, 137, 164; IK §47, 76
- Zainab bt. Jahsh (d. 20 or 21/640–641), wife of the Prophet, 18, 27 n.94
- al-Zuhri, Ibn Shihāb (d. 124/742), Medina, Successor, AA §31; IK §224



Index and Glossary of Topics and Terms

References to Chapter 1 are by page number; references to the three compilations are by section number. Words in CAPITAL letters are cross references.

Ablution, AA §27, 117
Adab prohibition, definition of, AA §36
 Adultery, 1K §59, 168, 169, 359; punishment for, 47; 1K §99
 Affinity, and sexual relations, 23; AD §3; AA §23, 47, 50, 61, 80, 87, 92; 1K §48, 251
 Age, appropriate for marriage, AA §7, 9, 10, 12, 16, 17, 22; 1K §5
 Agnate(s): as guardian of a woman, 11; AA §16; 1K §10, 24; order of, AA §9; 1K §13, 17; other responsibilities, 1K §93
Amīr (governor), as guardian, AD §19; AA §2
Amrūki biyadiki ("Your matter is in your hands"), discussion of, 48, 49; AD §79–84; AA §108; 1K §81, 132, 191, 245, 315, 330
Amāṣir (here, early Muslim garrison towns), AA §14
 Annulment, and ownership of slave spouse, 1K §120, 131. *See also* *Khul'*
Anṣār (early Madinese Companions, the "helpers" of Muhammad in Madina), and *ila'*, AA §124
 Apostasy, and divorce, 1K §232, 296
Aqrā' (plural of *qur'* MENSTRUATION): and *idda*, AA §134; meaning of, AD §164, 165; AA §161
 Arbitrator, and *khul'*, 1K §357
Ayo (verse of the Qur'an)

Ayyim (a woman who has been married), 9; permission required for marriage of, AD §20, 22. *See also* *Thayyib*
Bā'in: divorce statements with, 30, 31; AD §71; AA §127; explanation of, 30
Barīḥa: divorce statements with, 30, 31; AD §71; AA §127; 1K §83, 196; explanation of, 30
Batīl (void), 12; 1K §19, 252
Battā: divorce statements with, 30; AD §71–73; AA §123; 1K §208, 315; explanation of, 30 n.106; and *ḡhar*, AA §132
bikr (virgin): consent to a marriage, 9–11; AA §7; 1K §1, 6, 9; father's authority over, 9–10; AD §21, 22; 1K §1; triple divorce of, AD §93

Castaway, 1K §93
 Choose. *See* *Ikhṭār*
 Christian and Jewish wives, 15; AD §9, 10; AA §158; 1K §26, 29, 143
 Christians and Jews: and divorce, 1K §279, 283; and *hadd* punishment, 1K §58
 Circumlocutions, ambiguous and unambiguous in divorce statements, 28–29. *See also* *Intention*
 Clothing, as payment for wet nurse, 1K §249

Index and Glossary of Topics and Terms

Coercion, divorce invalid under, 36; AA §125, 131; 1K §71
 Coitus Interruptus, AD §66
 Companion of the Prophet, 4, 11, 24, 30, 38, 50, 59; AD §118, AA §87, 124, 161; 1K §204, 315
 Compilations: arrangement of, 7–8; collection of, 4, 5–6; description of, 5–8; transmission of, 6 n.19
 Comportment: during *idda*, 59; AD §156, 158, 163; AA §159; 1K §84, 197, 347, 349; of a slave, 1K §298; of a suitor, AA §95; 1K §22, 205; of a woman, AA §37, 38
 Concubine, and male slave, AD §63; 1K §38, 292, 293
 Conditions, in a marriage contract, 13; AD §51; 1K §127, 153, 234, 285, 286
 Consanguinity and marriage, AA §23, 31; 1K §30, 32, 41, 46–48, 50, 159, 160, 170, 342; and sexual relations, AA §11, 47, 64, 72, 88; 1K §170, 338, 348. *See also* *Foster-relationship*
 Consent, required for marriage contract, 9–13; 1K §1, 4
 Contract of marriage, 8–9; retroactive validation of, 13; 1K §18; validity of, 12; AD §17; 1K §4, 157, 236, 345
 Conversion, and marriage, AA §24, 29, 30, 33; 1K §16, 125, 158, 201, 227, 228, 279, 297, 353
 Custody, AD §4; AA §12, 85; 1K §52
 Deaf, dumb, and blind man, 1K §337
 Deaf-mute: divorce of, 36; marriage of, AA §45, 63
 Death illness. *See* *Terminal illness*
 Delirious man, divorce of, AA §97, 119
Dhimma (covenant of protection with non-Muslim subjects). *See* *Dhimmi*
Dhimmi (a free non-Muslim subject), marriage with, 15
 Disagreement, 4, 5, 11, 23, 48, 52; AD §28, 115, 151; AA §7, 19, 22, 24, 28, 57, 58, 119, 161; 1K §79, 91, 216, 235
 Divorce, 27–59; appropriate, 27; 1K §63; before intercourse, AD §93; AA §121, 149, 160; 1K §79, 110, 126, 204, 346; before marriage, AA §107–109, 113; 1K §95, 97, 108, 187, 316; contin-

gent upon a future time, 34; AD §99–101; 1K §73; contingent upon a third person, 33; AD §95, 98; 1K §190; final, 28; while sleeping, 36; silent, 36; AD §97; AA §119, 130; 1K §173; statements that produce, 28–39; AD §67–70; 1K §335. *See also* *Ilā'*; *Khul'*; *Lifān*; *Oaths*; *Salat*; *Zihar*
 Divorces, number of, 28; AD §177. *See also* *Intention*; *Single divorce*; *triple divorce*
 Dower, 8, 16–19; 1K §20, 145, 156; and conversion, 22; fair, 19–20; AD §35–39; AA §101, 103, 148; 1K §20, 155; and manumission, 18; AD §13–16; AA §62, 99, 100; maximum, 19; minimum, 19; nonpayment of, AD §52; of Prophet's wives, 18; AA §99; required for intercourse, 21–22; AA §12, 94, 160; 1K §15, 164, 223, 360; of a pledge, AA §21; required for privacy, 21; AD §43–45; AA §25, 26; 1K §78, 210, 230, 243, 303; of a slave, AD §41, 42, 50; AA §28; when given, AA §51, 89; 1K §21
 Elephantiasis, 1K §24
 Embryo. *See* *Fetus*
 Exile, punishment of, AA §101, 103
Faqīh (jurist), AA §110 and *passim*
Fāṣid (improper, invalid). *See* *Contract of marriage*; *Invalid marriage*
Fāṣiq (sinner), 1K §14
 Father: authority over daughter, 9–10; AA §12, 18, 19; 1K §1; authority over minor son, 10; AA §20, 70, 79; 1K §235, 237
Fatwā (legal opinion), 5 n.18, 36; AD §74, 75, 92, 95, 118, 131; AA §127; 1K §83, 294
 Fetus, development of, AD §56, 153, 173
Fiqh (jurisprudence), 2, 4; AA §65
Fitra, AA §71; definition of, 112 n.17
 Flogging, as punishment, AA §86, 101, 103; 1K §36, 60, 61, 264, 356, 359
 Forbidden marriage, 22–25; punishment for, AA §92; 1K §45, 287
 Forgetfulness, in divorce, AA §152; 1K §288, 329, 332

Fornication, 23; AD §33; AA §11, 23, 30, 46, 48, 101; IK §23, 26, 43, 108
 Foster-relationship, 22–25; establishment of, through intercourse, AD §53–55; AA §67, 72, 80, 92, 96; IK §43, 159, 169, 170, 251, 328; establishment of, through nursing, AD §3; AA §35, 47, 49, 50, 61, 64, 66, 67, 96; IK §43, 90, 91, 105, 160, 248, 328, 342

Grandfather, as woman's guardian, 11
 Guardian: of a bride, 9–13; of a minor girl, 9–10; marriage without, 12; AA §8, 9, 13, 14; IK §19, 252; as a suitor, 11–12; wrong, 11; AA §3, 6, 10, 15, 16; IK §6–8, 13, 15. See also *Wali*

Hadd (plural *Hudūd*): for adultery, 46, 47; definition of, 46n.161; for fornication, AA §101; IK §36; during 'idda, 58–59; of slaves, AA §135. See also *L'ān*

Hadith (TRADITIONS)

Hakam, IK §357

Hakim. See *Judge*

Halving divorce, AD §96

Hanbali, 3

Harām (forbidden), in divorce statements, AD §74–78; IK §68, 83, 95. See also *zihar*

Hijāb, explanation of, 24n.85, 27n.94

Hila (plural *Hiyal*. Legal stratagem), 7, AA §43

Household goods, AD §143

Hudūd (plural of *HADD*)

Hukm (legal judgment), 10n.26

'*Idda* (waiting period of a woman after end of marriage), 27–28; discussion of, 52–59; AD §137; divorce in, AA §111; IK §141; and *ilā'*, AA §124; inheritance in, AA §133; maintenance and lodging during, 57–59; IK §75; and missing husband, AD §115, 118–120; AA §78; of a slave, AA §44, 137, 164; IK §39, 40; of a slave widow, 53–54; AA §136, 154, 164; start of, IK §85. See also *Istihāḥ*; Menstruation; Pregnancy; Widow
Ikhlā'ni. See *Khul'*

Iḥṣān (moral respectability), IK §99; and *l'ān*, 47

Ikhṭārī ("Choose!"), 48; AD §85–87; IK §81. See also *Takhyir*

Ikhṭilāf. See *Disagreement*

Ilā' (oath of abstinence from intercourse by husband): discussion of, 42–45; IK §102, 272; divorce following, 44; AA §124; IK §103, 300; duration of, 43; AD §167–170; AA §124; IK §103, 273, 278; results of, 43; AD §102–105, 108; AA §124; IK §274, 277; slave swearing oath of, 43; AA §156; IK §53; and *zihar*, 45; AD §107, IK §271

Illicit sexual relations: effects of, 223; and *l'ān*, 46; punishment for, 47; IK §57, 60, 61, 223; and slaves, IK §217. See also *Adultery*; Fornication; *Hadd*

Illness, and divorce statements, AA §130

Impotent husband, AD §128–130; AA §75; IK §104, 107, 231, 295

Inheritance, AD §40; after 'idda, AA §140; IK §79, 87; in 'idda, AA §133, 140; IK §79, 87, 112, 150; and the *mafqud*, AD §120–125; and unbelievers, AA §92; in valid marriage, IK §2–5, 186; and *zihar*, AA §132

Insane man, his divorce invalid, 36; AA §97, 119

In shā'a Allāh ("God Willing"). See *Istithnā'*

Intention, in divorce statements, 29, 30, 32, 33; in ambiguous statements, AD §88–90, 94–97; IK §172, 176, 180, 181, 193, 195, 208, 319; and number of divorces, AD §79–82; AA §74, 108, 141, 145, 150, 152; IK §65, 111, 132, 177, 178, 258, 315, 317. See also *Single divorce*

Intoxicated man: irrationality of, 36–37; validity of his divorce, 36–37; AD §92; AA §97, 119; IK §70

Invalid marriage, AA §13, 16; IK §328; effects of, IK §287; and inheritance, IK §3, 4, 246, 247

Irrevocability of Islam, IK §359

Iraqi Scholars, IK §225, 318

Isnād (chain of transmitters of a *Hadith*), 2, 5, 6; weak, AA §57

Isolated Tradition, IK §317

Istihāḥ: definition of, 56; discussion of, AD §55, 56, 58–64; AA §48, 82, 138, 139; IK §55, 62, 109, 113, 219, 220, 224

Istithnā': definition of, 35; use of in divorce statements, 35–36; AA §118; IK §67, 225

'*Iq* (MANUMISSION)

Jewish Wives. See *Christian and Jewish Wives*

Jews. See *Christians and Jews*

Judge, 9; as a woman's guardian, 11; AD §19; AA §2, 9, 24, 91; IK §3–5, 11, 16, 18, 19; in *l'ān* procedure, AA §157; and missing husband, AD §124; IK §104

Jurisprudence, 2, 4; AA §65

Jurist, AA §110 and *passim*

Kadhif. See *Slander*

Kafā'a: definition of, 14; discussion of, 14–16; AD §5–8; IK §106

Kaffāra (expiation of an oath), for an oath of *zihar*, 41–42; AD §110–114; AA §74, 126, 132; IK §135

Khaliya: divorce statements with, 30, 31; AD §71, 72; IK §83; explanation of, 30

Khul': compensation in, 51–52; AD §132, 133; AA §54, 56, 353; description of, 50; IK §355, 357; and divorce, 50–52; AD §134; AA §53, 55, 57, 60, 111, 151; IK §192; divorce or annulment, 50–51; AA §58; IK §302; and 'idda, 51; IK §140; and terminal illness, 52; AD §149; IK §280

Laban al-fahl, IK §105; definition of, 24n.84; AA §64; IK §92

Lailat al-qadr, AD §110

Legal maxim, 11n.31, 12, 13, 25; AA §85; IK §127

Leprosy, IK §24

L'ān, 45–47; discussion of, AA §153; IK §98, 265–268; procedure for, AA §157; IK §115; punishment if illicit intercourse is proven in, 46; purpose of,

45; IK §142, 143, 260, 261, 275, 363; and slander, 46; AD §135; IK §51, 261, 264, 356, 359; and slaves, AD §136; IK §143; status of spouse in, IK §143. See also *Istihāḥ*

Lodging, and 'idda, AD §159–162; AA §110; IK §350

Lustful behavior, 24; AA §40, 41, 46, 95; IK §44, 327

Madhab (school of law), 2n.7

Madinese Scholars, legal opinions of, 5, 23; AD §73, 101, 171; AA §19, 23, 124, 125, 140; IK §56, 76, 115, 146, 225, 318

Mafqud (missing person), AD §115–127; AA §76, 77; IK §104, 354; his wife's 'idda, 55; AD §115, 118, 119; IK §275; his wife's maintenance, AD §131; his slave wife's 'idda, 56; AD §119

Magian, marriage of, AD §29, 30; IK §26, 201

Mahr (DOWER)

Maintenance: and 'idda, AA §110; IK §94, 144; and *khul'*, AA §59; husband must provide, AD §131; AA §17, 33; IK §148, 276, 309

Maliki. See *Madinese Scholars*

Manumission: as dower, AD §13–16; IK §321; in 'idda, IK §116, 131, 145, 310; and marriage, AA §32; IK §214, 254, 351; and ownership, AA §107; IK §241. See also *Tadbir*

Marriage, 8–27; desirability of, AD §68; during 'idda, AD §170; AA §140, 142; IK §19, 56, 77, 86, 206, 307; secret, 25–26; AA §5; IK §152. See also *Contract of marriage*; *Dower*; *Guardian*; *Kafā'a*; *Permissible marriage*; *Radd*; *Witnessing*

Masā'il (responses): definition of, 5n.18; description of, 5–6

Matin (text of a *Hadith*), 2, 6; discussion of, AA §86, 102, 104, 106, 133

Menstruation: and divorce, AD §142; and a woman's 'idda, 27–28, 52–53; AD §154, 155, 157; AA §138, 134, 148, 155, 162–164; IK §76, 146, 182, 202, 313, 341; and pregnancy, AD §157

Index and Glossary of Topics and Terms

Mihna (inquisition), 2
 Minor: divorce of, AA §147; IK §72, 339; marriage of, AD §25, 27; IK §2, 323, 346; responsibility for dower of a boy, AA §70
 Missing Person (*MAFQUD*)
 Mistake, in divorce, IK §332
Mudabbara (female slave manumitted by means of *TADBIR*)
Muhsan (a man possessing the quality of *IHSAN*)
Muhsana (a woman possessing the quality of *IHSAN*)
Mukatab (male slave manumitted by contract). See *Mukataba*
Mukataba (1. manumission by contract; 2. a female slave so manumitted), and *TAKHYIR*, IK §118
Mukhtal'a (woman divorcing her husband by means of *KHUL'*), IK §80
Mull (man who has sworn an oath of *IL'A*)
Mumad of 'A'isha, 3 n.13; of Ibn Hanbal, 2; of Ibn Rahwayh, 3
Mufa (1. temporary marriage), 13; AD §34; AA §81; IK §49
Mufa (2. divorce gift): amount of, AD §49; IK §244; discussion of, 20–21; explanation of, 17; when required, AD §46–49; IK §189
Nikah (MARRIAGE)
 Nursing, AD §1; IK §89, 174, 250, 333; of adults, 24–25; AA §67
 Oaths, IK §282; in divorce statements, 32–36; AD §152; AA §107–109, 117, 144; IK §255, 257–259, 331, 358
 Option: to dissolve marriage, IK §2, 4, 5; to divorce, see *Takhyir*
 Orphan: definition of, 10–11; guardian of, 11; AD §26, 28; AA §10, 22; IK §3
 Parent, obedience to, IK §163
 Paternity, establishment of, IK §56, 185, 206, 233, 240, 260, 263, 314, 340
 Permissible marriage, AA §87, 98; IK §30, 32, 239, 289, 334
 Physiognomy, AA §85, 102; IK §122, 223
 Pregnancy: and divorce, IK §66, 69; du-

ration of, AD §171–173; and 'idda, 54; AD §169, 170, 173; AA §136, 163; IK §94, 184, 323, 326
 Prisoner, should not marry, AA §69; IK §352
 Privacy, and presumption of intercourse, AD §43–45. See also *Dower*
 Puberty: of a boy, 10 n.27; of a girl, 10; AD §160
 Punishment: *hadd* for slaves, IK §58; *ta'zir*, IK §45
Qadhf (SLANDER)
Qadi (JUDGE)
Qur' (plural, *qur'* or *aqra'*). 1. Menstrual period; 2. the interval between two periods). See *Menstruation*. See also *Aqra'*
Qur'an. See *Interpretation*. See also *Index of Qur'an Verses*
Radd (1. nursing; 2. the nursing that creates foster-relationship and an impediment to marriage): discussion of, 22–25. See also *Foster-relationship*
 Ramadan, AD §44, 45; AA §43
 Ransom: of children, AA §52; IK §171, 217; and *khul'*, AA §58
 Rape, consequences of, IK §166
 Rawafid, AD §73
 Refuge, seeking, AA §122
 Relations between spouses, AD §143; IK §25, 28, 32–34, 284, 362
 Responses (*MAS'IL*), 5–6, 5 n.18
 Retroactive validation of a marriage, IK §36; not allowed, AA §8, 9, 28; IK §36
 Return: of dower, AA §121, 146; of husband to wife, AD §175, 177; IK §129, 147, 291; of the *mafqud*, AD §121–123, 125; after triple divorce, AA §148; of wife to husband, AA §105
 Revocation of marriage, AD §20
 Runaway slave, marriage and divorce of, AD §126; AA §52; IK §167, 226, 293, 294
Saddiq (DOWER)
 Sale, and divorce, 37–39; AD §138–140; IK §179, 304
 Secret marriage, 25–26; AA §5; IK §152

Index and Glossary of Topics and Terms

Separation, when not divorce, IK §229, 296, 299, 308, 357
Shighar marriage, 21 n.76; AA §25; IK §121
 Single divorce: counts as triple, AA §112, 123; IK §204; possible statement of, AA §128, 145; IK §82, 181, 208, 324
 Slander, 45, 46 n.161; IK §51, 141, 142, 262, 356, 359. See also *L'an*
 Slave: divorce of, AA §131; IK §117, 311; number of wives for male, AA §28; IK §42, 130; treatment of, AA §42; IK §60, 61, 216–218, 322, 343, 388
 Slave marriages: dower in, AD §41–42; owner's authority over marriage contract of, 10; AD §141; AA §91; simultaneous marriage with female slave and free woman, 15–16; AD §11–12; IK §27, 31, 37, 96; without permission, AD §33; AA §28; IK §36
 Slavery, children follow their mother in, AA §135; IK §64, 240
 Sleeping man, divorce of, AA §119, 130. See also *Divorce*
 Sodomy, IK §306
 Stipulation, in marriage contract, 9; IK §35
 Stoning, AA §86; IK §99, 287
 Successors (second generation of Muslims): Ibn Hanbal disagrees with two on interpretation of an *aya*, 53–54; their views, AA §156; IK §79, 81
 Suitor, as guardian, 12; AA §4, 6
 Sultan, 9–10 n.26; as guardian, AD §18
Sunna (1. practice of the Prophet; 2. normative practice of the Muslim community), 19, 29, 58; AD §131, 160; AA §88, 111 (title); IK §4, 5, 20, 24, 63, 79, 112, 113, 122, 146, 201, 224, 296, 307, 308, 312, 313, 315, 316, 323, 357, 361
Sura (chapter of the Qur'an)
 Syrian Scholars, IK §225
Tadbir (manumission effective at death of owner), AA §104
Tafwid, definition of, 19; AD §35 (title)
Tahlid: definition of, 28 n.98; disapproval of, AD §176; IK §253
Takhyir: discussion of, 48–49; IK §213;

and manumission, 49; IK §117; and number of divorces possible, 48, 49; AA §114; IK §117, 191, 315
Talaq (DIVORCE)
Talaq al-sunna (appropriate divorce), 27; IK §63
Tamlik, 48, 49. See also *Amruki bryadiki*
Ta'zir (discretionary punishment decided on by judge), IK §45
 Temporary marriage, 13; AD §34; AA §81; IK §49
 Terminal illness: divorce during, 37; AD §144–149; AA §140; IK §79, 187, 198–200, 246, 257, 281, 336; marriage during, AA §34, 140
Thayyib (a woman who has been married), 9; her permission required for marriage, AD §22; AA §7, 22; IK §1, 9. See also *Ayyim*
 Torture. See *Coercion*
 Touch. See *Lustful behavior*
 Traditions: definition, 2 n.3, 4, 6; and Ibn Hanbal and Ibn Rahwayh, 7, 8–59 *passim*; AA §66, 68; IK §317
 Treatment of slave. See *Slave*, treatment of
 Triple divorce, AD §74, 93, 98; AA §74, 112, 123, 127; IK §181, 193; counts as single, AA §145; IK §194, 208, 256
Umm al-walad (female slave who has borne a child of her owner), IK §128, 161, 361; length of her 'idda, 54–55; AD §166; AA §135; IK §54, 149, 212, 220–222, 312; and the *mafqud*, AD §123; and *tadbir*, AA §104; as a widow, AA §34; IK §119; and *zihar*, AD §109
 Unbeliever, marriage forbidden with, IK §106
 Uncle, as woman's guardian, 11
 Validity: of divorce statement, AA §39; IK §175, 344; of marriage contract, IK §1, 6, 7, 18, 19, 37, 186
Wali (guardian), AD §13, 17, 20, 23, 24; AA §1; IK §5. See also *Guardian*
Walima (wedding banquet), 26–27
 Wet nurse, AD §4; AA §68; IK §93, 207, 238, 249, 342

Index and Glossary of Topics and Terms

Widow: *'idda* of, AD §153; AA §136, 148, 154, 163, 164; IK §150, 320; inheritance of, AA §84, 148; IK §112
 Widower, inheritance of, AA §148
 Wife, divorce initiated by, 48–52. *See also* *Khul'*
 Witnesses: of adultery, IK §168; of a divorce, IK §74, 83, 242; of a marriage, 8, 9; IK §34, 37; marriage without, AA §1; IK §37; of a return, AD §175; IK §162, 164
 Witnessing: of a marriage, 25–27; AA §4, 13, 14; IK §8, 318; of a woman, AD §1, 2; IK §74, 89, 183, 318, 333

Zihar: definition of, 39; IK §136, 137; divorce by means of, 39–42; AD §153; IK §83; divorce by means of, before marriage, AD §76–78, 106; AA §113; expiation of oath for, 41–42; AA §126, 132; IK §101, 123, 133, 134, 138, 203, 270, 290; formulas of, 41; AA §126, 132; IK §100, 134, 269, 301; and *ĥalā'*, 45; IK §139; slave wife divorced by means of, 40; AD §109; AA §73, 74, 132; IK §114, 209
Zimā (ADULTERY or FORNICATION)

"... definitely a significant contribution to the history of Islamic law . . ."

—HERNARD WEISS, PROFESSOR OF ARABIC AND ISLAMIC STUDIES, UNIVERSITY OF UTAH

While western-derived legal codes have superseded Islamic law in many parts of the Muslim world, Islamic, Koran-based law still retains its force in the area of marriage and family relations, the area that is key to the status of women. This work makes available for the first time in English three compilations of responses to questions about family law given by two prominent Muslim jurists of the ninth century (third century of Islam)—Ahmad b. Hanbal, the eponymous founder of the Hanbali rite of Sunni Islam (the one dominant in Saudi Arabia), and Ishāq b. Rāḥwayh. These compilations are basic sources for the study of the development of legal thinking in Islam.

The introduction to the translation locates the compilations in a historical context and elucidates how the various issues of family law are treated. An appendix contains a collation of the significant variants among the manuscripts and printed versions of the Arabic texts. The volume concludes with a topical index and an index of names.

Susan A. Specter is an associate professor of Arabic at Queens College of the City University of New York.